(9)

No. 96-203-CFY Title: Joyce B. Johnson, Petitioner
v.
United States

Docketed: August 7, 1996 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Aug 11 1995	Application (A95-144) for release pending appeal, submitted to Justice Kennedy.
	Aug 15 1995	Application (A95-144) denied by Justice Kennedy.
	Aug 5 1996	Petition for writ of certiorari filed. (Response due October 21, 1996)
	Aug 29 1996	Order extending time to file response to petition until October 7, 1996.
	Oct 2 1996	Order further extending time to file response to petition until October 21, 1996.
	Oct 18 1996	Brief of respondent United States filed.
	Oct 30 1996	DISTRIBUTED. November 15, 1996
	Nov 15 1996	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 30, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 29, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 14, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT February 25, 1996. **********
	Dec 30 1996	Brief of petitioner Joyce B. Johnson filed.
	Dec 30 1996	Joint appendix filed.
	Dec 30 1996	Brief amicus curiae of David R. Knoll filed.
	Dec 30 1996	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jan 8 1997	CIRCULATED.
	Jan 29 1997	Brief of respondent United States filed.
	Feb 14 1997	Reply brief of petitioner Joyce B. Johnson filed.
	Feb 25 1997	ARGUED.

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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JOYCE B. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

1. Is reversal of a perjury conviction required where the trial judge, not the jury, decides the essential element of materiality?

2. In what manner is United States v. Gaudin, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), to be applied to cases then on direct appeal in circuits where a Gaudin-type objection would have been frivolous at the time of trial?

3. Does Sullivan v. Louisiana, 508 U.S. 275 (1993), limit the holding of United States v. Olano, 507 U.S. 725 (1993)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

No. 96-____

IN THE
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vs.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Joyce B. Johnson, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on March 19, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix 1a through 9a, to this petition and is unpublished. That court's affirmance without published opinion is noted at 82 F.3d 429.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on March 19, 1996. A timely Petition for Rehearing was denied by that Court of Appeals on June 11, 1996, and a copy of the unpublished Order Denying Rehearing appears at Appendix 10a through 11a to this petition. The unpublished judgment of the Court of Appeals, which was entered on March 19, 1996, and issued as the mandate on June 20, 1996, appears at Appendix 12a through 13a to this

petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Fifth and Sixth Amendments to the Constitution of the United States. The Fifth Amendment provides, in pertinent part:

> No person shall...be deprived of life, liberty or property, without due process of law....

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below.

Joyce B. Johnson was convicted of one count of perjury under 18 U.S.C. §1623 in

the United States District Court for the Middle District of Florida. The basis for federal jurisdiction in the court of first instance was under 18 U.S.C. §3231.

B. The Facts Material to the Questions Presented.

Joyce B. Johnson was convicted following a jury trial on one count of having made false material statements to a United States grand jury with respect to disposition of cash proceeds of alleged narcotics transactions by Earl Fields, the father of her teenaged daughter. She was accused of testifying falsely with respect to the source, circumstances of receipt, amount and whereabouts of funds used for the improvement of certain residential real property, which funds she told the grand jury had come from a source other than Mr. Fields. Ms. Johnson had acknowledged to the grand jury that some

of the funds she had used to purchase the property had been provided by Mr. Fields.

At trial, in December, 1994, the district court did not submit determination of the materiality element of the perjury charge to the jury, but rather instructed the jury that the government had demonstrated materiality of the statements at issue. Ms. Johnson's counsel did not concede that the statements were material but did not object to the trial judge determining the materiality issue. The practice of the trial judge making the determination of materiality, vel non, was required by long-standing circuit precedent. See, e.g., United States v. Molinares, 700 F.2d 647, 653 (11th Cir. 1983).

At the time of trial in this case, almost every circuit had held that the determination of materiality in a false

statement prosecution was an issue of law for decision by the trial judge, not the jury. See, United States v. Gaudin, 28 F.3d 943, 955 (9th Cir. 1994) (Kozinski, J., dissenting), aff'd., 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Subsequent to the trial in Ms. Johnson's case and prior to briefing in the Court of Appeals, the Court rendered its decision in United States v. Gaudin, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), holding that failure to submit the question of materiality to the jury in certain false statements prosecutions violates a defendant's constitutional right for a jury to determine guilt beyond a reasonable doubt of every element of a charged offense.

The Court of Appeals in this case reviewed the issue for plain error. The court below found that Ms. Johnson could

not sustain a burden of showing that the error affected her substantial rights by having prejudicially affected the outcome of the original trial. In making that determination, the Court of Appeals weighed the evidence of materiality and affirmed Ms. Johnson's conviction upon a finding that such evidence was substantial and "overwhelming." Appendix at 8a-9a.

REASONS WHY THE WRIT SHOULD BE GRANTED

The decision of the Court of Appeals contravenes holdings by this Court that the Due Process and Jury Trial Clauses of the Fifth and Sixth Amendments entitle a criminal defendant to a jury verdict on each element of a charged offense. United States v. Gaudin, 515 U.S. ___, ___, ___, 115 S.Ct. 2310, ___, ___, 132 L.Ed.2d 444, 449, 458 (1995); Sullivan v. Louisiana, 508 U.S. 275, ___, 113 S.Ct. 2078, ___,

124 L.Ed.2d 182, 188 (1995); In Re Winship, 397 U.S. 358, 364 (1970). The Court has not decided the important issue of the standard of review appropriate where juries are prevented from deciding an essential element of a charged offense, in accordance with clearly established binding precedent that is conclusively overruled while direct appeals of the jury verdicts remain pending, particularly as to Gaudin error. See, Gaudin, 515 U.S. at ____, 115 S.Ct. at ___, 132 L.Ed.2d at 461 (Rehnquist, C.J., concurring). The circuits are in great conflict about this issue. Compare, e.g., United States v. Baumgardner, 85 F.3d 1305, 1308-1310 (8th Cir. 1996) (Gaudin error results in reversal under plain error analysis); United States v. McGuire, 79 F.3d 1396, 1401-1405 (5th Cir. 1996) (same); United States v. Nash, 76 F.3d 282, 285 (9th Cir.

1996) (same); United States v. Perez, 67 F.3d 1371, 1386 (9th Cir. 1995) (court must correct error of failure to submit element of offense to jury under plain error analysis), reh'g. en banc granted, 77 F.3d 1210 (9th Cir. 1996); United States v. DiRico, 78 F.3d 732, 737-738 (1st Cir. 1996) (absence of jury verdict as to materiality is a structural defect requiring reversal); United States v. Pettigrew, 77 F.3d 1500, 1511 (5th Cir. 1996) (harmless error analysis inapplicable to Gaudin error); United States v. David, 83 F.3d 638, 641-648 (4th Cir. 1996) (plain error reversal based on Gaudin error) with United States v. Keys, 67 F.3d 801, 811-812 (9th Cir. 1995) (Gaudin error does not require reversal under plain error analysis), reh'g. en banc granted, 78 F.3d 465 (9th Cir. 1996); United States v. Ross, 77 F.3d 1525, 1540-

1541 (7th Cir. 1996) (defendant meets all elements of plain error analysis but court declines to exercise discretion to reverse); United States v. Allen, 76 F.3d 1348, 1368 (5th Cir. 1996) (same as Ross), petitions for cert. filed, ___ U.S.L.W. ___, Nos. 95-9169 and 95-9205 (May 28, 1996); United States v. Kramer, 73 F.3d 1067, 1075-1078 (11th Cir. 1996) (substantial rights unaffected because of weight of evidence); United States v. Toussaint, 84 F.3d 1406 (11th Cir. 1996 (same as Kramer); United States v. Johnson, 82 F.3d 429 (11th Cir. 1996) (table) (instant case, Case No. 95-2417, 11th Cir. March 19, 1996, same as Kramer) (Appendix at 8a-9a). See also, United States v. Lopez, 71 F.3d 954, 959-961 (1st Cir. 1995) (holding that Gaudin error is incapable of review for harmlessness but suggesting in dicta that plain error

review would produce different result), cert. denied, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 64 U.S.L.W. 3837 (June 17, 1996); United States v. Ali, 68 F.3d 1468, 1474-1475 (2d Cir. 1995) (reversal for Gaudin error without any harmless or plain error inquiry), modified on other grounds, 86 F.3d 275 (2d Cir. 1996).

The Court has held clearly that a defendant charged with certain federal false statement offenses has a constitutional "right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged," including the materiality of alleged false statements. Gaudin, 515 U.S. at ____, 115 S.Ct. at ___, 132 L.Ed.2d at 458. The Court has held conclusively that the absence of a constitutional jury verdict may not be reviewed for harmless error absent an

error capable of review for harmlessness, i.e., prejudice, such as where no jury verdict of guilty beyond a reasonable doubt was actually rendered at trial. See, e.g., Sullivan v. Louisiana, 508 U.S. 275, ___ - ___, 113 S.Ct. 2078, ___-___, 124 L.Ed.2d 182, 189-191 (1993). Additionally, a reviewing court cannot disregard, by use of a harmlessness analysis of the weight of the evidence, a failure of a jury to make any determination of an essential element of an offense. Carella v. California, 491 U.S. 263, 273 (1989) (Scalia, J., concurring).

The Court has not decided the important question of whether the error at issue in this case is subject to plain error analysis. United States v. Gaudin, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 461 (Rehnquist, C.J.,

concurring). However, the right to a jury determination of each element of a charged offense is a constitutional guarantee of structural dimension. Carella, 491 U.S. at 268 (Scalia, J., concurring). Error resulting in an absence of a jury verdict as to each element of an offense is simply incapable of review for prejudice. Sullivan v. Louisiana, 508 U.S. 275, ___ - ___, 113 S.Ct. 2078, ___-___, 124 L.Ed.2d 182, 189-191 (1993). Even if a plain error analysis applies, the Court should consider whether the absence of a jury verdict on each element of an offense meets the "substantial rights" prong of the inquiry by seriously affecting "the fairness, integrity or public reputation of judicial proceedings," meriting reversal of a conviction. United States v. Olano, 507 U.S. 725, 736 (1993)

(citation and internal quotations omitted).

The harmless error analysis of Fed.R.Cr.P. 52(a), see Sullivan, 408 U.S. at ___-___, 113 S.Ct. at ___-___, 124 L.Ed.2d at 189-191, is materially identical to the prejudice prong of a Fed.R.Cr.P. 52(b) inquiry, see Olano, 507 U.S. at 734-735 (1993), with respect to consideration of the weight of the evidence, although differing as to which party bears the burden of appellate persuasion. Olano, 507 U.S. at 734 (defendant bears burden of showing prejudice under Fed.R.Cr.P. 52(b)). But see, United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994) (burden under Rule 52(b) shifted to prosecution in light of intervening decision changing previously settled law), cert. denied, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995).

The Court should consider the important question of whether Gaudin error is merely "trial error" or is a "structural defect affecting the framework within which the trial proceeds," Arizona v. Fulminante, 499 U.S. 279, 310 (1991), rendering any analysis under Fed.R.Crim.P. 52 violative of the Due Process and Jury Trial clauses of the Fifth and Sixth Amendments.

Fed.R.Cr.P. 52(b) codifies prior decisional law grounded, at least in part, on a policy concern to promote accurate legal decisions in trial courts, and to inhibit sandbagging of trial courts, which thwarts such a goal. Fed.R.Cr.P. 52 advisory committee notes (1944 adoption); Wiborg v. United States, 163 U.S. 632, 658 (1896); United States v. Young, 470 U.S. 1, 15-16 (1985). However, these concerns simply are not implicated where, as in the present case, a motion or objection would

have been utterly frivolous and wasteful in light of clear, binding precedent at the time of trial and so was not raised, but becomes meritorious in light of an intervening clear change in law during the pendency of direct appeal. See, e.g., United States v. Baumgardner, 85 F.3d 1305, 1308-1309 (8th Cir. 1996). A defendant should not be faulted for failing to have made a trial objection under such circumstances. See, id. A contrary result would encourage frivolous objections during trials.

Additionally, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 328 (1987). If

viewed under a plain error analysis, reviewing courts must determine whether the error must have been clear at the time of trial to be noticed or whether plainness on appeal is the proper measure.

This important question remains unsettled by this Court. See, Gaudin, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 461 (Rehnquist, C.J., concurring) (suggesting issue "subject to dispute"); Olano, 507 U.S. at 734 (question unanswered). But see, Griffith, 479 U.S. at 326 ("Court does not disregard current law, when it adjudicates a case pending before it on direct review...regardless of the specific characteristics of the particular new rule announced"). The strongly predominant view in the courts of appeals is that plainness or clarity of error turns on the state of the law at the time of appellate adjudication, consistent

with Griffith. United States v. Baumgardner, 85 F.3d 1305, 1308-1309 (8th Cir. 1996) (plainness of error determined under law existing at time of appeal); United States v. McGuire, 79 F.3d 1396, 1402 (5th Cir. 1996) (same); United States v. Walker, 59 F.3d 1196, 1198 (11th Cir.) (same), cert. denied, ___ U.S. ___, 116 S.Ct. 547, 133 L.Ed.2d 450 (1995); United States v. Keys, 67 F.3d 801, 809-810 (9th Cir. 1995) (same), reh'g. en banc granted, 78 F.3d 465 (1996); United States v. Webster, 84 F.3d 1056, 1067 (8th Cir. 1996) (same); United States v. David, 83 F.3d 638, 645-646 (4th Cir. 1996) (same); United States v. Ross, 77 F.3d 1525, 1539-1540 (7th Cir. 1996) (same); United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994) (same), cert. denied, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995); United States v. Retos, 25 F.3d 1220, 1230 (3d

Cir. 1994) (same); United States v. Jones, 21 F.3d 165, 173 and n. 10 (7th Cir. 1994) (same). But cf., United States v. Calverly, 37 F.3d 160, 163-163 and n.18 (5th Cir. 1994) (en banc) (question not specifically addressed but viewing plainness from perspective of law at time of trial), cert. denied, ___ U.S. ___, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995); United States v. Washington, 12 F.3d 1128, 1139 (D.C. Cir.) (supervening decision doctrine created to provide defendant the benefit of change in law), cert. denied, ___ U.S. ___, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994). This important question should be settled or the Court should consider whether a Gaudin error is ever subject to any Fed.R.Cr.P. 52(b) analysis.

The essential element of materiality in perjury prosecutions must be submitted to the jury for decision of guilt beyond a

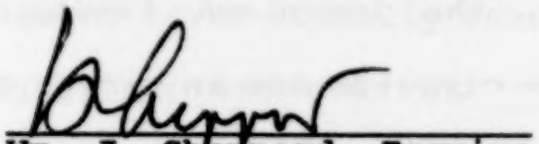
reasonable doubt, vel non. Gaudin, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 458. Review of a Gaudin error for harmlessness or for prejudice under Fed.R.Cr.P. 52(b), see Olano, 507 U.S. at 734, unconstitutionally leaves judges to review decisions never actually reached by juries. Sullivan, 508 U.S. at ___, 113 S.Ct. at ___, 124 L.Ed.2d at 189-190. Guilt beyond a reasonable doubt as to each element of a charged offense must be determined by a jury, not judges reviewing a record, or else the wrong constitutional decisionmaker has decided the case. See, Carella v. California, 491 U.S. 263, 269 (1989) (Scalia, J., concurring), quoting, Bollenbach v. United States, 326 U.S. 607, 614 (1946); Cabana v. Bullock, 474 U.S. 376, 384-385 (1986); and Rose v. Clark, 478 U.S. 570, 578 (1986).

The constitutional right to a jury trial in a criminal case is a profound and fundamental prohibition against judges making determinations of guilt. Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968). This Court has not addressed, but should settle, the important issues presented, and the circuits are in direct conflict as to the important question of the proper standard of review of Gaudin error under the circumstances presented. The Court should grant review to correct the erroneous application of Fed.R.Cr.P. 52(b) by the Court of Appeals to review a verdict never fully reached by the jury in this case, as well as to answer the fundamentally important question of the proper standard of review of Gaudin error in circuits where Gaudin constituted a clear break with prior binding precedent during the pendency of direct appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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August 2, 1996

No. 96-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JOYCE B. JOHNSON,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 2, 1996

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2417

D.C. Docket No. 94-54-Cr-J-20

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOYCE B. JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(March 19, 1996)

Before ANDERSON and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

ANDERSON, Circuit Judge:

On December 9, 1994, a jury convicted defendant-appellant Joyce B. Johnson of perjury in violation of 18 U.S.C. § 1623. The district court sentenced Johnson to 30 months in prison. On appeal from that conviction, Johnson raises a number of claims, all of which we find to be without merit and to warrant no discussion, with the exception of her claim regarding the trial court's instruction to the jury regarding the materiality element of the perjury count. Because we find that the trial court's erroneous instruction does not rise to the level of plain error, we affirm Johnson's conviction and sentence.

Johnson had a long-term relationship with Earl James Fields, who in the late 1980s was the focus of a federal investigation into alleged cocaine trafficking involving Fields and another man, Willie Bennett. That investigation

revealed that Bennett and Fields netted around $10 million from their trafficking activities. In 1993, federal investigators and a federal grand jury began a search for that money. To this end, Johnson was called to testify before the grand jury on March 25, 1993. Johnson testified that she was employed by the Florida Department of Health and Rehabilitative Services at an annual salary of $34,000. She also testified that she owned five real properties including her house, to which she had added considerable improvements. Those improvements raised the appraised value of the property from $75,600 when Johnson purchased it in 1991 to $344,800 in 1993. Johnson insisted before the grand jury that she received the money for the improvements, which she asserted amounted

to between $80,000 and $120,000, from a friend of her mother.

Johnson was indicted for perjury as a result of her testimony before the grand jury. It was revealed at Johnson's subsequent trial that Fields negotiated the purchase of Johnson's home from its previous owner. Johnson paid for the property with eight different cashier's checks, including two checks from a corporation in which Fields had an interest.

At the close of Johnson's trial, the trial judge charged the jury that the element of materiality in the crime of perjury is a question for the judge to decide. Accordingly, the judge instructed the jury that Johnson's statements to the grand jury were material to the grand jury's investigation. Johnson did not object to this instruction. In fact, when

the United States began to present evidence concerning materiality during the trial, Johnson's counsel objected, insisting that materiality was a matter for the trial judge and not the jury. The Assistant United States Attorney attempted to question the grand jury foreman about the nature of the grand jury's investigation, and specifically about Fields' narcotics distribution and money laundering activities. At that point, Johnson's counsel stated, "Your honor, this is an improper matter for the jury. It goes to materiality and that's a matter for the Court, and I object." This objection was overruled.[1]

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[1] It could be argued that Johnson invited the district court's error in this case by insisting that the materiality determination be made by the court. See United States v. Chandler, 996 F.2d 1073, 1084 (11th Cir. 1993) (because defendant argued for and submitted jury instruction at issue, he invited the error contained

The United States Supreme Court has subsequently ruled that the materiality of false statements is an issue for the jury, not the judge. United States v. Gaudin, ___ U.S. ___, 115 S.Ct. 2310 (1995). This is true of prosecutions for perjury under §1623. See Porat v. United States, ___ U.S. ___, 115 S.Ct. 2604 (1995). However, because Johnson did not object at trial to the district court's determination of the materiality issue, we review the district court's decision to reserve the materiality determination for itself for

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therein and cannot on appeal complain that the instruction was erroneous); United States v. Hill, 500 F.2d 733, 738 (5th Cir. 1974) (particular jury instruction alleged on appeal to be erroneous was invited error because defense requested that instruction). It is likely that Johnson's counsel did not want this evidence before the jury, because it would hurt Johnson's case. However, because we find that the district court did not commit plain error, we need not reach the issue of invited error.

plain error. United States v. Kramer, 73 F.3d 1067, 1074 (11th Cir. 1996); see also Fed.Rule Crim P. 52(b); United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777 (1993).

The Supreme Court's decision in Olano sets forth a three-part test for clear error determinations. Reviewing courts must investigate: (1) if there was indeed error, (2) if that error was plain (i.e. clear or obvious), and (3) if that plain error affected "substantial rights." Id. at 1777-1778; United States v. Stevenson, 68 F.3d 1292 (11th Cir. 1995). If we find clear error that affects Johnson's "substantial rights," we have the discretion to remedy the district court's error. Olano, 113 S.Ct. at 1779. That discretion is to be exercised when "a miscarriage of justice would otherwise result," such that "the error seriously

affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. (internal quotations omitted).

We conclude that the trial court's error in this case does not satisfy the three-part test set forth above. Assuming arguendo that the district court's error was clear or obvious, we hold that it did not affect the "substantial rights" of the defendant. To implicate "substantial rights," an error must have been prejudicial such that it affected the outcome of the original trial. Id. at 1777-1778; Kramer, 73 F.3d at 1074. Johnson bears the burden of persuasion with respect to the determination of prejudice. Olano, 113 S.Ct. at 1778; Kramer, 73 F.3d at 1074 n. 17; see also United States v. Chandler, 996 F.2d 1073, 1087 (11th Cir. 1993). Normally this

requires that the appellant make a specific showing of prejudice. Olano, 113 S.Ct. at 1778.

After reviewing the record in this case, we find overwhelming evidence of the materiality of Johnson's statements. The focus of the grand jury's investigation was the whereabouts of the proceeds from Fields' drug trafficking activities. There was substantial evidence that Johnson, and specifically her house, was one of the avenues through which Fields laundered that money. No reasonable juror could conclude that Johnson's false statements about the source of the money used to purchase and renovate her house were not material to the grand jury's investigation. Therefore, Johnson's conviction for perjury is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2417

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOYCE B. JOHNSON,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____ F.2d _____/

Before: ANDERSON and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2417

D.C. Docket No. 94-54-Cr-J-20

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOYCE B. JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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Before ANDERSON and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction and sentence imposed by the said District Court in this cause be and the same are hereby AFFIRMED.

Entered: March 19, 1996
For the Court : Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 6/20/96

(2)

No. 96-203

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOYCE B. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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13 pp

QUESTION PRESENTED

Whether the court of appeals correctly affirmed petitioner's perjury conviction under the plain error rule, Fed. R. Crim. P. 52(b), where, although the trial court, without objection, had resolved the issue of materiality itself rather than submitting it to the jury, no reasonable jury could have found petitioner's false testimony to have been immaterial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OCTOBER TERM, 1996

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JOYCE B. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported, but the judgment is noted at 82 F.3d 429 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1996. The petition for rehearing was denied on June 11, 1996 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on August 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner

was convicted of perjury, in violation of 18 U.S.C. 1623. She was sentenced to 30 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-9a.

1. In the 1980s, Earl James Fields and another man netted approximately $10 million from cocaine trafficking. Pet. App. 2a-3a. In 1993, federal investigators and a federal grand jury sought evidence about the nature of Fields' drug distribution and money laundering activities. See 1 Tr. 163, 183.

On March 25, 1993, petitioner—who had been involved in a long-term relationship with Fields—was called before the grand jury to testify about whether, and to what extent, she had received money from Fields over the years. Petitioner acknowledged that she owned five real properties, including her house, to which she had made improvements. Those improvements raised the house's appraised valuation from $75,600 when petitioner bought it in 1991 to $344,800 in 1993. Petitioner testified that she had received the money for the improvements from a friend of her mother. In fact, however, the money had come from Fields. Petitioner's false testimony about her source of funds formed the basis for her perjury indictment. Pet. App. 3a-4a, 9a.

2. At the close of trial, the district court instructed the jury that, in a perjury prosecution, the element of materiality is a question for the court, rather than the jury, to decide. The court then instructed the jury that petitioner's statements to the grand jury had been material to the grand jury's investigation. Petitioner did not object to those instructions. In fact, when the government had earlier presented evidence at trial concerning materiality, defense counsel had unsuccessfully objected: "Your honor, this is an improper matter for the jury. It goes

to materiality and that's a matter for the Court, and I object." Pet. App. 4a-5a.

3. After petitioner was convicted, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Constitution requires submission to the jury of the issue of materiality when it is an element of a charged offense. On appeal, petitioner contended that her conviction should be reversed because the district court had decided the materiality question itself. The court of appeals agreed with petitioner that, under *Gaudin*, the district court had committed error. Because petitioner had not objected to that error at trial, however, the court of appeals reviewed the court's action for plain error under Federal Rule of Criminal Procedure 52(b). Pet. App. 6a.

In conducting its plain error review, the court of appeals assumed that the district court's error was "clear or obvious." Pet. App. 8a; see generally *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The court went on to find, however, that the error did not affect petitioner's "substantial rights," and therefore did not require reversal under Rule 52(b), in light of the "overwhelming evidence" that her false claims were in fact material. The court explained:

> The focus of the grand jury's investigation was the whereabouts of the proceeds from Fields' drug trafficking activities. There was substantial evidence that [petitioner], and specifically her house, was one of the avenues through which Fields laundered that money. No reasonable juror could conclude that [petitioner's] false statements about the source of the money used to purchase and

renovate her house were not material to the grand jury's investigation.

Pet. App. 9a.

DISCUSSION

The Eleventh Circuit correctly held that, because petitioner failed to object at trial, her challenge under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), is subject to plain error review under Rule 52(b), and that because no reasonable juror could have found her false statement immaterial, her conviction should be affirmed. Nonetheless, that decision conflicts with the Ninth Circuit's recent decision in *United States* v. *Keys*, No. 93-50281, 1996 WL 512389 (Sept. 11, 1996) (en banc), which was decided shortly after the filing of this petition. Because the issues presented in this case and in *Keys* are of recurring importance, this Court's review is warranted.

1. Until the *Keys* decision, every court of appeals to have addressed challenges to convictions under *Gaudin* had determined that plain error review under Rule 52(b) is the appropriate standard for reviewing a district court's failure, in the absence of an objection, to permit the jury to decide the issue of materiality when it is an element of the offense. See, *e.g.*, *United States* v. *David*, 83 F.3d 638, 641 (4th Cir. 1996); *United States* v. *Randazzo*, 80 F.3d 623, 631 & n.4 (1st Cir. 1996); *United States* v. *Ross*, 77 F.3d 1525, 1540-1541 (7th Cir. 1996); *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996); see also *United States* v. *Jones*, 21 F.3d 165, 172 (7th Cir. 1994) (Rule 52(b) is "sole source" of appellate authority for reviewing errors to which defendant made no timely objection).

A defendant is not eligible for relief under the plain error rule unless the defendant shows that the

district court committed (1) an "error" (2) that was "plain," "clear," or "obvious" and (3) that affected his "substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). Even where such a showing is made, however, "Rule 52(b) is permissive, not mandatory." *Id.* at 735. A reviewing court should exercise its "discretion" to reverse a conviction for plain error only "if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (internal quotation marks omitted).

Petitioner contends (Pet. 13) that it is always reversible error for a district court to decide the materiality element of an offense whether or not a defendant makes an appropriate objection at trial. We disagree. Until the Ninth Circuit's recent en banc decision in *Keys*, every court of appeals to have considered the issue after *Gaudin* was decided had held that a district court's failure to submit the materiality issue to the jury does not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings" under the final, discretionary prong of the *Olano* plain error analysis where the evidence of materiality at trial was clear and overwhelming, as in this case.[1] See *United States* v.

[1] Petitioner has never advanced any theory as to how a reasonable juror could have questioned the materiality of her false statements. At petitioner's trial, the federal agent who had interviewed petitioner before her grand jury appearance testified that federal investigators were focusing on Fields' drug trafficking and money laundering activities, see 1 Tr. 163, and the foreperson of the grand jury before which petitioner had appeared testified that the grand jury was also investigating Fields' "drug operation" and "money laundering." 1 Tr. 183-184. Petitioner did not seek to contradict that evidence. And

McGhee, 87 F.3d 184, 186-188 (upholding conviction on plain error review of *Gaudin*-type error), judgment vacated and rehearing en banc granted, No. 95-6323, 1996 WL 552728 (6th Cir. Sept. 19, 1996); *Randazzo*, 80 F.3d at 632 (same); *Ross*, 77 F.3d at 1540-1541 (same); see also *United States* v. *Baumgardner*, 85 F.3d 1305, 1310 (8th Cir. 1996) (reversing conviction on plain error review where "the evidence of materiality was slim"); *David*, 83 F.3d at 647-648 (reversing conviction because, among other considerations, "a jury could conceivably have concluded * * * that materiality was not ultimately proven"); *United States* v. *McGuire*, 79 F.3d 1396, 1404-1405 (reversing conviction because of a "serious factual question regarding the materiality of [defendant's] statements"), rehearing en banc granted, 90 F.3d 107 (5th Cir. 1996); *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (distinguishing between harmless and plain error review of *Gaudin*-type errors), cert. denied, 116 S. Ct. 2529 (1996).

2. In *Keys*, the Ninth Circuit, sitting en banc, departed from that line of authority. The court held that, at the time of the *Keys* defendant's trial (which, like petitioner's trial, predated *Gaudin*), a "solid wall of circuit authority" would have made any objection fruitless, and that plain error review of a *Gaudin*-type error under those circumstances would be "unconscionable." *Keys*, 1996 WL 512389, at *4. Thus, even though the defendant had not objected to the failure to submit materiality to the jury in a perjury prosecution, the court reviewed the conviction "not for plain error, but only for error under Rule 52(a)." *Id.* at *5.

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petitioner has not disputed that her false statements—*i.e.*, that she received over $100,000 in cash from a friend of her mother, and not from Fields, to renovate her house—were clearly material to the grand jury's inquiry into the size, seriousness, and methods of Fields' cocaine operation and the means of laundering its proceeds. See generally *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) (describing materiality standard).

The *Keys* court then held that a district court's failure to instruct the jury on the issue of materiality constitutes a "structural" defect requiring reversal of a conviction except where a "review of the facts found by the jury establishes [beyond a reasonable doubt] that the jury necessarily found the omitted element." *Keys*, 1996 WL 512389, at *6 (quoting *Roy* v. *Gomez*, 81 F.3d 863, 867 (9th Cir. 1996) (en banc) (emphasis omitted)); see generally *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993); *Lopez*, 71 F.3d at 960-961. Because the jury's verdict in *Keys* did not logically include a finding of materiality, the Ninth Circuit held that harmless error review under Federal Rule of Criminal Procedure 52(a) was unavailable and that the *Gaudin* error at issue in *Keys* required reversal of the conviction. *Keys*, 1996 WL 512389, at *6-*7. Three judges dissented, observing that the *Keys* decision puts the Ninth Circuit "at odds with eight other circuits," including the Eleventh. *Id.* at *8-*9 (Kleinfeld, J., dissenting) (citing *United States* v. *Kramer*, *supra*).

3. We believe that the plain error standard of Rule 52(b) is applicable to a district court's failure to submit the materiality question to the jury in the absence of a timely objection, whether or not such an objection would be inconsistent with a "solid wall of circuit authority." We therefore believe that a *Gaudin* error does not require reversal of a perjury conviction where, as here, no reasonable juror could

have found a defendant's false statements immaterial.[2] As noted above, that position comports with the decisions of every court of appeals that has considered the issue after *Gaudin*, other than the Ninth Circuit. Nonetheless, the Ninth Circuit has now squarely rejected that position, and that court likely would have reached a different result in this case.[3] Because

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[2] The court of appeals reasoned that *Gaudin* errors that do not cast doubt on "the outcome of the original trial" do not require reversal because they do not affect "substantial rights" for purposes of Rule 52(b). Pet. App. 8a-9a; see also *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996). Other courts, by contrast, have held that the reason such errors do not require reversal is that they do not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings" under the discretionary prong of the *Olano* plain error analysis. See cases cited at pp. 5-6, *supra*; see generally *United States* v. *Olano*, 507 U.S. 725, 736 (1993). Either approach would conflict with the Ninth Circuit's rule of automatic reversal for virtually all *Gaudin*-type errors. Review of this case would enable this Court to consider both approaches, as well as the separate issue of whether an "error" that is consistent with established judicial precedent at the time of trial is properly characterized as "plain." See *id.* at 734; *United States* v. *David*, 83 F.3d 638, 641-646 (4th Cir. 1996); *United States* v. *Washington*, 12 F.3d 1128, 1138-1139 (D.C. Cir.), cert. denied, 115 S. Ct. 98 (1994); *United States* v. *Merlos*, 8 F.3d 48, 51 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1635 (1994).

[3] Because petitioner specifically objected at trial to the presentation of evidence to the jury that petitioner believed was relevant only to materiality, see Pet. App. 5a, petitioner's conviction could arguably be upheld on "invited error" grounds that are narrower than the "plain error" analysis actually adopted by the court of appeals. See *id.* at 5a-6a n.1 (declining to decide case on invited error grounds). Nonetheless, in *Keys*, the Ninth Circuit noted that its analysis would have been no different if, as the United States had urged, the court had found that the defendant "invited," rather than simply acquiesced in, the error of which he complained on appeal. See *Keys*, 1996 WL 512389, at *4 n.2. For that reason, even if petitioner could be shown to have "invited" the *Gaudin* error in this case, Ninth Circuit precedent still would have entitled her to a reversal of her conviction.

the issues presented here are recurring and important, the Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1996

(3)

No. 96-203

In The

Supreme Court of the United States

October Term, 1996

JOYCE B. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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90 pp

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. Case No. 94-54-Cr-J-20

JOYCE B. JOHNSON,

Defendant.

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

March 29, 1994	–	Indictment
March 31, 1994	–	Order Setting Conditions of Release
April 1, 1994	–	Record of Hearing: Arraignment
April 28, 1994	–	Motion to Suppress Statements, by defendant
May 9, 1994	–	Motion to Dismiss Indictment, by defendant
May 9, 1994	–	Report and Recommendation that Motion to Suppress Statements be denied
May 23, 1994	–	Response to Motion to Dismiss Indictment, by Government
May 27, 1994	–	Order Denying Motion to Dismiss Indictment and Denying Motion to Suppress Statements
June 1, 1994	–	Motion to Suppress Grand Jury Testimony of Defendant and all evidence derived therefrom, by defendant

June 15, 1994 – Response to Motion to Suppress Grand Jury Testimony of Defendant and all evidence derived therefrom, by Government

July 5, 1994 – Supplemental Memorandum in Support of Motion to Suppress Grand Jury Testimony of Defendant and all evidence derived therefrom, by defendant

July 13, 1994 – Report and Recommendation that Motion to Suppress Grand Jury Testimony of Defendant and all evidence derived therefrom be denied

July 25, 1994 – Objection to Third Report and Recommendation, by defendant

October 17, 1994 – Order Adopting Third Report and Recommendations and Denying Motion to Suppress Grand Jury Testimony of defendant and all evidence derived therefrom

December 5, 1994 – Requested Jury Instructions, by Government

December 5, 1994 – Motion in Limine, by defendant

December 6, 1994 – Record of Hearing: Jury Trial

December 6, 1994 – Requested Jury Instructions, by defendant

December 6, 1994 – Motion to Redact Transcript of Grand Jury Testimony of Joyce B. Johnson, by defendant

December 6, 1994 – Motion for Disclosure of Grand Jury Audio Recording, by defendant

December 6, 1994 – Motion in Limine to Exclude Evidence With Regard to Defendant's Purchase of Real Property, by defendant

December 6, 1994 – Oral Order Denying in Motion to Exclude Evidence With Regard to Defendant's Purchase of Real Property, Denying Motion for Disclosure of Grand Jury Audio Recording and Granting in Part and Denying in Part Motion in Limine to Exclude Irrelevant and Prejudicial Evidence Pursuant to Fed.R.Evid. 401, 402, 403 and 404(b)

December 7, 1994 – Record of Hearing, Jury Trial

December 7, 1994 – Oral Motion for Judgment of Acquittal, by defendant

December 7, 1994 – Oral Order Denying Motion for Judgment of Acquittal

December 8, 1994 – Record of Hearing – Jury Trial

December 8, 1994 – Oral Motion for Judgment of Acquittal, by defendant

December 8, 1994 – Oral Order Denying Motion for Judgment of Acquittal

December 8, 1994 – Supplemental Requested Jury Instructions, by defendant

December 9, 1994 – Record of Hearing – Jury Trial; Defendant found guilty, conditions of release remain same

December 9, 1994 – Court's Instructions to Jury

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA

v.

JOYCE B. JOHNSON

Case No. 94-54-Cr-J-20
Ct.1: 18 U.S.C. § 1623
(5 yrs./$250,000/both/
3 yrs. SR)

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about March 25, 1993, at Duval County, in the Middle District of Florida,

JOYCE B. JOHNSON,

the defendant herein, while a witness and under oath before a Federal Grand Jury of the United States District Court, did knowingly and willfully make false, material declarations, that is to say:

A.

At the time and place aforesaid, the Federal Grand Jury was engaged in an investigation of alleged distribution of cocaine and marihuana by Earl James Fields, a/k/a Taz, a/k/a Shorty, a/k/a Shorty Taz, and the disposition of money which was proceeds of this cocaine

and marihuana distribution activity, including the possible concealment of such proceeds as investments in real estate.

B.

It was a matter material to the Grand Jury to determine the source of funds invested in the reconstruction of the premises located at 8063 Moore Avenue, Jacksonville, Florida, where Joyce B. Johnson was living.

C.

At the time and place aforesaid, the defendant, Joyce B. Johnson, while under oath, did knowingly and willfully make the following declarations before the Federal Grand Jury with respect to the aforesaid matter (charged false declarations underlined [here shown in italics]):

Q. Any other property?

A. No, except the one I'm living in.

Q. Right.

A. Okay.

Q. Which is on Moore Street?

A. Right, Moore Avenue.

Q. Moore Avenue. How much is that piece of property worth?

A. I think it's probably worth about $150,000. probably. I'm just guessing.

Q. How much did you pay for it?

A. $90,000. I paid –

Q. When did you buy that?

A. In May of '91.

Q. You said it's now worth $150,000?

A. Yes.

Q. Did you do any improvements on the property?

A. Yes.

Q. How much money did you put in the improvements?

A. That I can't say exactly but I have put quite a bit. I would not have even – I would not have even considered getting that property unless I already had the monies to put into it.

The monies that I put into it was monies that was given to my mom and me back in probably '85, '86, and as I told Mr. Stull, I'm not sure of the exact amount. I wasn't aware that he was going to ask me other things about me. But the monies were given to me, me and my mom, because it was given to me by – and I guess you all want to know, right?

Q. Yes, please.

A. Okay.

Q. Very curious.

A. *It was given to me by this same man that has already paid my four years' tuition to college* and he also gave me an Omega watch back in 1964 when I graduated from high school.

How this happened was is that my mom worked at a motel in Baldwin for, God, my

father left home when I was eight months old. I was born and raised in Baldwin. He left home so I never had a father but I had grandparents that were always there for us, so my mom moved in with them and was working seven days a week at a motel.

And at that time, at the time that she was working there, she found a wallet of this white gentleman that was from Canada, he was from Bowmanville, Ontario. His name was Gerald Talcott, T-a-l-c-o-t-t.

He – after Mother found the wallet, she returned it, and – well, he thought he had lost it. He had gone probably as far as – because Baldwin is where 90 and 301 dissect, and he was going through from Canada going down south. Normally he went through to Clearwater, Florida.

But anyways, Mother found the wallet, held it until he came back, because he called back to see if anybody had found it, and Mother did. It probably had between $100, $150 in it, but it had his ID, driver's license, charge cards and those kind of things.

So with that, my mom and he became friends because it was just he and his wife, no children, and they were – he would always – they would write each other and then Mother would tell him that I was in school, that I was an A student and back then we were bused to Stanton. And being bused to Stanton from Jacksonville, we were bused 10th, 11th and 12th grades.

My being from Baldwin didn't allow me the chance to get a scholarship because only the

well-known children got scholarships, the teachers' daughters or the principals' sons or the people that knew somebody. But the out-of-city, out-of-city kind of kids, even if they were A students didn't get a chance to go the college.

So my mom, in writing and talking to him, was advising Mr. Talcott that I was not going to be able to go even though I was number 19 or 21 in a class of 420 back in '64. And, of course, I had never had a gold watch before but then I still even have that watch now because my daughter – it was given to my daughter on her 14th birthday. And it's an Omega that is intact and you can teil that it's old, old watch.

Q. How much money did he give to you and your mom in 1985 or '86?

A. *Well, see, I'm not really sure exactly how much it was because it was given to us – it was given to us in a box and it was basically for my mom, for her and her livelihood, because he was talking about how hard she had had it, how hard she had worked, and the fact that he just wanted her to be sure she did all right.*

And, like I said, if I said to you exactly how much it was, I would be lying to you.

Q. Approximately.

A. *Approximately maybe from $80- to $120,000 maybe. I'm not even sure.*

Q. That was back in '85 or '86?

A. *Yes.*

Q. How many sisters and brothers do you have?

A. One. One sister alive, one brother that died ten years ago with lung cancer.

Q. Your mother was still living in Baldwin when she got the money?

A. *Yes.*

Q. Where was she living in Baldwin?

A. It's four of them that lived together. My mom lives at one trailer. My sister lives next door. My uncle lives there and my aunt lives there. So, it like an area.

And my mom did in fact leave me the trailer when she died. She died two years ago, October 1990.

Q. So, this money was given to her you said '85, '86?

A. *Yes*

* * *

Q. What year was this that you bought this property on Moore Street?

A. May '91. May 1991.

Q. That was after you had received this $80- to $120,000?

A. I knew I already had that to use.

Q. That money you had put in your savings account at Jax Navy?

A. No, no, no, that's from my savings. No, ma'am. Through the years.

Q. Money that's in the savings is from your savings through the years?

A. Yes.

Q. So, where was this $80,000 once – after your mother died, where did you keep that money?

A. *I just kept it in a closet like my mom did.*

Q. Wouldn't it have been better to get the interest on that money?

A. No. Because I was also told, too, though, that if it's a gift and you are not earning any interest on it, then it still remains a gift. If you put it in the bank and you are earning interest on it, then you pay taxes on it.

Q. So, you have this $80,000 or more?

A. *$80- or more.*

* * *

Q. How much did the improvements cost you?

A. I know they cost at least all I had and then I remortgaged the house to get an additional $47,000.

Q. When you say at least all you had, did that include that $80,000 you had at home in the closet?

A. Yes.

Q. And all the money in your savings account?

A. Yes, yes. No, not all, because my car – my Cadillac was totaled back in January '92, and when it was totaled I got 9,6- from the car being totaled.

And then I got a lawyer because, well, we were hurt a little bit, too, because he ran red lights and ran into us. So I probably have close

to $15,000 in my savings at First Union to eventually buy me another car.

But now that we don't get interest back on cars anymore, I don't know if I'm going to get one anytime soon.

Q. You said you are not sure how much those improvements cost you?

A. *No, but it cost all of the monies that my mother left me. That was – all of that was used. So I'd say, and I'm only guessing, I'd say roughly the $80- to $120-*, I'm not really sure because we are talking about the bricks – not the bricks, the cement, we are talking about the floors, we are talking about the walls, we are talking about the roof, we are talking about – and then I did bring receipts, too.

D.

The aforesaid testimony of the defendant, Joyce B. Johnson, as she then and there well knew, was false in that she and/or her mother had not received $80,000 - $120,000 from Gerald Talcott in 1985 - 1986 and in that the funds invested in the reconstruction of 8063 Moore Avenue came from other sources.

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL

/s/ Benjamin W. Mixon
FOREPERSON

LARRY H. COLLETON
United States Attorney

/s/ Ernst D. Mueller
ERNST D. MUELLER
Assistant United
States Attorney

/s/ Brian M. Kane
BRIAN M. KANE,
Managing
Assistant United
States Attorney

UNITED STATES OF AMERICA
GRAND JURY INVESTIGATION
FEDERAL COURT GRAND JURY
139 POST OFFICE BUILDING
JACKSONVILLE, FLORIDA 32201

MATTER NO. 9056177
TESTIMONY AND PROCEEDINGS
2:08 p.m., March 25, 1993

TESTIMONY OF WITNESS
JOYCE B. JOHNSON

ALL PROFESSIONAL REPORTERS
716 PINE STREET
NEPTUNE BEACH, FLORIDA 32266
PHONE 904/249-0476

[p. 2] TESTIMONY AND PROCEEDINGS before the Federal Grand Jury, held in the Grand Jury Room, 139 United States District Court and Post Office Building, 311 West Monroe Street, Jacksonville, Duval County, Florida 32201, commencing at 2:08 p.m., on Thursday, March 25, 1993, before Noel S. Seiler, Registered Professional Reporter, CM, and a Notary Public in and for the State of Florida at Large.

[p. 3] APPEARANCES

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Assistant United States Attorney
United States Attorney's Office
409 Post Office Building
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Jacksonville, Florida 32201,

attorneys for the Government.

[p. 4] TABLE OF CONTENTS

[p. 5] PROCEEDINGS

2:08 p.m. March 25, 1993

JOYCE B. JOHNSON,
having been produced and first duly sworn as a witness on behalf of the Government, testified as follows:

EXAMINATION

BY MS. INNIS-THOMPSON:

Q Please state your name and spell your last name.

THE FOREMAN: Bring your chair up so you will be closer to the microphone.

THE WITNESS: Joyce B. Johnson, J-o-h-n-s-o-n.

BY MS. INNIS-THOMPSON:

Q Good afternoon, Ms. Johnson. My name is Janice Innis-Thompson. I'm an Assistant United States Attorney.

Seated before you are members of the federal Grand Jury and we are conducting an investigation and we have asked you here today. I think you received a subpoena regarding that investigation.

Now, you are not currently a target of this investigation; however, if you have the right to remain silent because anything you say can and will be used against you in later proceedings.

And you have the right to an attorney. If you can't afford an attorney, the Court will appoint one for [p. 6] you. Do you have an attorney?

A I had one that was willing to come with me but then the times and dates changed so much that he did not have any time available for this afternoon.

Q Do you think that you would like to speak to the Grand Jury even without him being here?

A Sure.

Q Okay.

A Hopefully so this will be over.

Q Ms. Johnson, could you please tell us how old you are.

A 45. 46 in June.

Q What's your date of birth?

A 6/17/47.

Q How much education have you had?

A Bachelor's in English from Florida A & M University.

Q What do you currently do for a living?

A I'm the recruitment supervisor for the District IV, seven counties from Volusia County to Nassau County.

Q What agency is that?

A Health and Rehabilitative Services.

Q Do you have any children?

A Yes, two.

Q How old?

[p. 7] A Ramell, a son, 25. And Erica, a daughter, 14.

Q Are any of these children at home with you now?

A Erica.

Q Where do you currently live?

A At 8063 Moore Avenue, 32208.

Q Now, as a recruitment supervisor for HHS –

A HRS.

Q I'm sorry, HRS. I apologize.

A Yes.

Q In the federal system we deal with the HHS so that's why I said that.

Approximately how much money do you make per year?

A Probably about between $33- to $35,000.

Q That's before taxes?

A Yes.

Q Do you own any properties in Jacksonville?

A Um-hum.

Q Can you list some of those, please.

A The home that I just moved from in September, I owned it as of – I'm not sure of the month, in '85. It was a home that I bought back in '73 that was only it was $12,500 back in '73. So, the house notes were no more than $103, $117, so it was paid off early.

Q What's the address?

[p. 8] A 3230 West Moncrief Road.

Q You still own that property?

A Yes. My son lives in that.

Q Any other properties?

A Um-hum. I have a piece of property at 3502 Hunt Street that a fellow I knew was losing, so I was able to get a mortgage and – second mortgage and be able to keep that and rent it out.

Q How much did you pay for that piece of property?

A Just the second mortgage, just by getting a second mortgage that would pay the – the foreclosure amount.

Q Approximately how much was that?

A It was a second mortgage that was about $10,000.

Q When did you buy that piece of property?

A I'm not sure of the date. But I've had it probably about three – maybe three or four years, but I've been filing taxes with it since that time.

Q That would be about the late '80s that you purchased that piece of property?

A Yes.

Q Any other property?

A And then I bought a piece of property that Mary Sheppard was selling for a thousand down and I could take over the mortgage note of $138 a month, so I was able to [p. 9] get that, too.

Q Where is that property located?

A That's 3515 – on Cecilia Street. I'm not sure of the exact address. It's on Cecilia Street.

Q What's the total value of that piece of property?

A I'm not even sure because I haven't paid taxes yet.

Q When did you purchase that?

A That's been a while back, too. Probably about – it's been since '85 because – it's been since '85 but I'm not sure of the exact date, but then she no longer wanted it and was going to – and it was abandoned, too, at the time.

Q So you don't know what the value is on it?

A No.

Q You pay –

A It was a duplex but it's now just a one-family dwelling and it's a wooden house that, I don't know, it's just a wooden house that's not worth that much, but it does give me rents and I've been filing with that.

Q How much rent?

A I recently got somebody that moved in it probably eight or nine months ago that pays $400 a month.

Q And the property on Hunt Street, is that rented also?

[p. 10] A Yes.

Q How much rent?

A That's rented and the rental I'm thinking is $375 a month. HUD pays a portion and the person pays an amount, too.

Q And –

A The same lady was living in the house when I bought it, too. It was going in foreclosure.

Q The Moncrief Road, you said your son lives in that property, does he pay you rent?

A He is supposed to be buying the house from me but children don't always pay as they should pay, but yes, he's supposed to be buying it from me.

Q Any other pieces of property?

A Yes. Sixth Avenue. I was going to build a house. Well, I've – I was going to build a house on the Sixth Street address. It wasn't going to be for income. And a Mr. – so I bought this property by just taking over the mortgage. No monies changed hands or anything because he no longer wanted the property, and I think it's 8817 Sixth Avenue, yes.

Q How much was the mortgage on that?

A Mortgage on that is $349.25.

Q Do you know the approximate value of that piece of property?

[p. 11] A No, but it could probably – if I ever get the money, it could probably – I could probably build two houses on the property. It's a big piece. It was a dream that I was going to build there eventually.

Q How big is the property then?

A It's two iots. Two lots.

Q Acre? Two acres?

A No, not that much.

Q Two regular city-type lots?

A Yes.

Q Any other property?

A No, except the one I'm living in.

Q Right.

A Okay.

Q Which is on Moore Street?

A Right, Moore Avenue.

Q Moore Avenue. How much is that piece of property worth?

A I think it's probably worth about $150,000, probably. I'm just guessing.

Q How much did you pay for it?

A $90,000. I paid –

Q When did you buy that?

A In May of '91.

Q You said it's now worth $150,000?

[p. 12] A Yes.

Q Did you do any improvements on the property?

A Yes.

Q How much money did you put in the improvements?

A That I can't say exactly but I have put quite a bit. I would not have even – I would not have even considered getting that property unless I already had the monies to put into it.

The monies that I put into it was monies that was given to my mom and me back in probably '85, '86, and as I told Mr. Stull, I'm not sure of the exact amount. I wasn't aware that he was going to ask me other things about me. But the monies were given to me, me and my mom, because it was given to me by – and I guess you all want to know, right?

Q Yes, please.

A Okay.

Q Very curious.

A It was given to me by this same man that has already paid my four years' tuition to college and he also gave me an Omega watch back in 1964 when I graduated from high school.

How this happened was is that my mom worked at a motel in Baldwin for, God, my father left home when I was eight months old. I was born and raised in Baldwin. He [p. 13] left home so I never had a father but I had grandparents that were always there for us, so my mom moved in with them and was working seven days a week at a motel.

And at that time, at the time that she was working there, she found a wallet of this white gentleman that was from Canada, he was from Bowmanville, Ontario. His name was Gerald Talcott, T-a-l-c-o-t-t.

He – after Mother found the wallet, she returned it, and – well, he thought he had lost it. He had gone probably as far as – because Baldwin is where 90 and 301 dissect, and he was going through from Canada going down south. Normally he went through to Clearwater, Florida.

But anyways, Mother found the wallet, held it until he came back, because he called back to see if anybody had found it, and Mother did. It probably had between $100, $150 in it, but it had his ID, driver's license, charge cards and those kind of things.

So with that, my mom and he became friends because it was just he and his wife, no children, and they were – he would always – they would write each other and then Mother would tell him that I was in school, that I was an A student and back then we were bused to Stanton. And being bused to Stanton from Jacksonville, we were bused 10th, 11th and 12th grades.

My being from Baldwin didn't allow me the chance [p. 14] to get a scholarship because only the well-known children got scholarships, the teachers' daughters or the principals' sons or the people that knew somebody. But the out-of-city, out-of-city kind of kids, even if they were A students didn't get a chance to go the college.

So my mom, in writing and talking to him, was advising Mr. Talcott that I was not going to be able to go even though I was number 19 or 21 in a class of 420 back in '64.

He said, "If Joyce is that smart, what I'll do is I'll send her," and he paid my tuition for all four years.

When I graduated, though, his wife had died, and he gave me her Omega watch for my graduation present, and that was back in '64. And, of course, I had never had a gold watch before but then I still even have that watch now because my daughter – it was given to my daughter on her 14th birthday. And it's an Omega that is intact and you can tell that it's old, old watch.

Q How much money did he give to you and your mom in 1985 or '86?

A Well, see, I'm not really sure exactly how much it was because it was given to us – it was given to us in a

box and it was basically for my mom, for her and her livelihood, because he was talking about how hard she had had it, how hard she had worked, and the fact that he just [p. 15] wanted her to be sure she did all right.

And, like I said, if I said to you exactly how much it was, I would be lying to you.

Q Approximately.

A Approximately maybe from $80- to $120,000 maybe. I'm not even sure.

Q That was back in '85 or '86?

A Yes.

Q How many sisters and brothers do you have?

A One. One sister alive, one brother that died ten years ago with lung cancer.

Q Your mother was still living in Baldwin when she got the money?

A Yes.

Q Where was she living in Baldwin?

A It's four of them that lived together. My mom lives at one trailer. My sister lives next door. My uncle lives there and my aunt lives there. So, it like an area.

And my mom did in fact leave me the trailer when she died. She died two years ago, October 1990.

Q So, this money was given to her you said '85, '86?

A Yes.

Q What did she do with the money?

A I don't know that my mom did much with anything [p. 16] because my mom worked at – for the state, too, at Northeast Florida State Hospital.

And my mom was not a person that goes out and buys much of anything, so most of the things that my mom bought were things that I would buy, like I would buy her suits for her birthday or suits for Christmas and those kinds of things.

But other than going to church and working, my mom didn't really do much of any buying a lot because even when my – my stepfather died probably a couple of years even before '90, so that had to be '88.

Well, then, when he died, my mom at that time bought a new trailer and gave my sister that property and gave my sister her old original trailer and then bought the property next door and moved to that trailer, moved to a double-wide trailer next door.

So, I don't know, I don't really know that she did that much except kept it. But I did call the IRS to be sure that it was monies that we could keep, and I was told that if it was a gift and that there were no stipulations for it, that it was okay, it was okay to have.

They did –

Q If I could interrupt you for a second. How was your mother living at that time? Was she living pretty well?

[p. 17] A Oh, sure, Mother was doing okay, yes. She didn't have any responsibilities except herself. Well, and,

well, I had a stepfather, too, but then my stepfather wasn't – he didn't do that much. We had a stepfather but then he drank and he really didn't help my mom that much. My mom worked and made a living. My stepfather worked sometimes.

Q So, what happened to the money once your mother died in 1990?

A My mom had colon cancer so she had been sick for a couple of years actually. And of course she was coming over for radiation treatment and cancer and chemotherapy treatments, too.

Q How was that paid for?

A My mom had insurance, too, from the state. Remember, she was still working at the – and she went off on retirement disability, too, when she stopped working, and that was probably two years before '90, so that had to be '88, and she stopped working due to her colon cancer, too.

Q When she died, what happened to this money, this $80- to $120,000?

A It was basically mine and my mom's anyway to use however we saw fit. Well, basically it was supposed to be for my mom but my mom is no longer there.

Q Did you use any of it before your mother died?

[p. 18] A No. I had no need to.

Q Did she have sole possession of it –

A Yes.

Q – when she was alive?

A Mother had the sole possession until probably a few months before she died.

Q Once she died, all that money came to you?

A Yes.

Q That would have been about 1990?

A Yes.

Q Did your sister get any of this money?

A No.

Q Why is that?

A My sister got all of my mom's insurance monies which was a bit, too. And then the monies that was given to my mom and myself from Mr. Talcott was basically for my mom and her well-being basically and of course to me.

Q Is Mr. Talcott still living?

A No. My mom – well, my mom always said she thought that undoubtedly he wasn't going to be living that long after he gave it to us anyway because he brought it to us. Granted he would always give my mom money or he would always bring gifts to my mom, too, through the years, but then he had never ever done anything like that.

So we really figured that – and my mom continued [p. 19] to write him even after that. But then at first the letters would just get there and then never come back, and towards the end, the letters would get returned.

Q Back up for a second. You would have gotten $80-, $120,000 roughly back in 1990. These properties that you said you purchased, the Moncrief Road, the Hunt Street, the Cecilia Street and the Sixth Avenue property, and I guess it would be Sixth Avenue, did you use any of this money to purchase those?

A No, none of it.

Q How did you purchase those pieces of property?

A Okay. I drove a Volkswagen for 13 years. The only property that I have ever bought was the property that I bought on Moncrief Road prior to then.

And I did bring my pay stubs, too, showing how I've saved for those kinds of things. And I've always had a savings. I've been with the agency for 24 years, too. I started back in '69 right out of college.

I bought the property in '73, I bought the house for $12,5-, and that house note was no more than $117 ever for the years that I was buying it.

After having driven a Volkswagen for 13 years, I was determined I was going to buy a Cadillac and I did in '84 finally. And then – but when – by the end of '84, I knew that I no longer had a house note anymore. I only had [p. 20] a car note.

Then from '84 to '86 I drove a lemon that was back and forth, back and forth, with it because it wasn't running good.

Then '86 I bought another one because it was a lemon. But I had to get a lawyer in order to get it because they weren't going to do much. '86 –

Q Let me stop you there because we are under some time limitations. I'm more interested in these properties than I am interested in the cars.

The property we were talking about, we discussed the Moncrief Road, that was the first piece you purchased. Now, the Hunt Street, you said it was a thousand dollars down or –

A Hunt Street?

Q Hunt Street.

A No, no, I got a second mortgage of $10,000 that paid off the –

Q That was on the Moncrief property?

A Hunt Street.

Q Hunt Street. Okay.

A Yes, ma'am.

Q Then –

A I paid a thousand dollars down for the Cecilia.

Q All right.

[p. 21] A Yes.

Q And during this period of time you had two children by then, right, by the 1980s?

A '80s?

Q Yes.

A Yes.

Q '84, '85, you had your son and your daughter?

A Yes.

Q Were you the sole parent supporting those two children?

A No. I have never had to solely support my daughter.

Q Okay.

A My ex-husband paid child support of $60 a month until my son was 18, but that was hardly nothing, yes.

Q Okay.

A I was the sole support for my son, with the exception of $60 a month.

Q Okay. We will get back to your daughter's support in a second. Let's go through the purchases of these properties.

Hunt Street, you got a second mortgage on that property?

A Right.

Q And then you paid $300 – how much did you pay on [p. 22] the second, how much did you pay on the second?

A I still am. It's $114 a month. But all the while now, I'm also getting $375 a month in rentals.

Q Then the Cecilia Street property you put a thousand dollars down?

A Um-hum.

Q That was from your own savings?

A Right.

Q You bought that in '85?

A No. On the what?

Q Cecilia Street.

A A thousand dollars down?

Q Yes.

A Yes, yes, okay.

Q And the Eighth Street you just assumed the mortgage?

A Assumed the mortgage.

Q You are still paying for those?

A Yes.

Q All those properties you are still making payments on right now?

A Yes.

Q Some of them you get money, you get $400 rent on one and $375 so that balances out, but pretty much you are still paying for all of that?

[p. 23] A Right.

Q Now –

A My income tax returns show all of that, too.

Q Okay.

A Okay.

Q Let's go to the Moore Avenue property. You were saying that – I asked you I think before you paid $90,000 for that piece of property. Where did you get the money?

A I assumed a mortgage.

Q Assumed a mortgage?

A Assumed a mortgage that was close to $40,000, yes. I got $22- – I had $25,000 in my savings at my credit union, and I think I took out $16- or $18-, I'm not sure which.

Q You borrowed $16- or $18,000?

A No, out of my savings.

Q Okay.

A Out of my savings. And then I have a Jax Navy savings that I took $5,000 out of. I think I took $20- out because I had $25- in my credit union savings, because I was upset that my credit union wouldn't loan me $50,000 with my having $25,000 in their credit union.

Q What year was this that you bought this property on Moore Street?

A May '91. May 1991.

[p. 24] Q That was after you had received this $80- to $120,000?

A I knew I already had that to use.

Q That money you had put in your savings account at Jax Navy?

A No, no, no, that's from my savings. No, ma'am. Through the years.

Q Money that's in the savings is from your savings through the years?

A Yes.

Q So, where was this $80,000 once – after your mother died, where did you keep that money?

A I just kept it in a closet like my mom did.

Q Wouldn't it have been better to get the interest on that money?

A No. Because I was also told, too, though, that if it's a gift and you are not earning any interest on it, then it still remains a gift. If you put it in the bank and you are earning interest on it, then you pay taxes on it.

Q So, you have this $80,000 or more?

A $80- or more.

Q And you had an additional $25,000 in one savings account and how much in the other one?

A $5-, maybe about $5500 in Jax Navy.

[p. 25] Q This was all monies you saved from your income from HRS?

A Yes.

Q And from the properties that you are renting that you don't have to pay back all the money in rent?

A Because I'm earning enough to pay them, yes.

Q Okay.

A My last car note was in '89.

Q So, the $90,000 that – you assumed the mortgage for $40,000, and then you borrowed money from your own savings, you took out money from your own savings, a total of about $22,000?

A Yes.

Q And you put down on that property. Now you said you also made some improvements on the property.

A Yes.

Q How much money, how much improvements?

A Well, I really – I have – the house originally was a two-bedroom, one bath, living room, dining room, kitchen.

Q How many square feet was it originally?

A I'm not even sure because I don't know square footage. And – but it's now three bedrooms, three baths, living room, dining room, kitchen, large den, two and a half car garage.

[p. 26] Q It's basically redone?

A Yes, basically redone, yes.

Q Do you have any idea how much square footage you have in the house now?

A No.

Q How much did the improvements cost you?

A I know they cost at least all I had and then I remortgaged the house to get an additional $47,000.

Q When you say at least all you had, did that include that $80,000 you had at home in the closet?

A Yes.

Q And all the money in your savings account?

A Yes, yes. No, not all, because my car – my Cadillac was totaled back in January '92, and when it was totaled I got $9,6- from the car being totaled.

And then I got a lawyer because, well, we were hurt a little bit, too, because he ran red lights and ran into us. So I probably have close to $15,000 in my savings at First Union to eventually buy me another car.

But now that we don't get interest back on cars anymore, I don't know if I'm going to get one anytime soon.

Q You said you are not sure how much those improvements cost you?

A No, but it cost all of the monies that my mother left me. That was – all of that was used. So I'd say, [p. 27] and I'm only guessing, I'd say roughly the $80- to $120-, I'm not really sure because we are talking about the bricks – not the bricks, the cement, we are talking about the floors, we are talking about the walls, we are talking about the roof, we are talking about – and then I did bring receipts, too.

We are talking about – and then a lot of the work was done on weekends even by friends that I know or we

even had barbecues and beer on Saturdays and in order that they do some of the things. Even with that I'm sure that all of that was used, yes.

Q Who was the primary person doing all the construction for you?

A I was my own contractor, and what I did have was a friend of ours that, well, my uncle had used through the years, too, to add an addition to his house.

Q Who was –

A Clyde Simmons. He directed me to a lot of the roofers, a lot of the persons, the carpenters, the drywall persons and those kinds of things.

And I was at my house every day 12:00 o'clock from August '91 when the construction began until I moved in on September 1992, so it was a year and some months that the work went on.

Q You stayed home during that year?

[p. 28] A At Moncrief, yes.

Q Okay.

A I stayed home at Moncrief but every day at lunchtime I would go to the house, and every afternoon at 5:00 I would go to the house, too. Because usually I had to either pay the person that had done anything or meet somebody for – and then my boss was nice enough to me, too, to allow me off if I needed to go stay somewhere or be somewhere or meet somebody to get this done or meet somebody to get certain things done, yes.

Q What side of town is that piece of property?

A On the Northside.

Q So, you say right now you think it's valued at about $150,000?

A Yes.

Q And the only monies you received to or that you used –

A No, no, no, no. I also used some monies – I also used some monies for my downpayment because I only had $22- what did I say I had? About $22,000? Plus the – and I assumed a mortgage of $37- or whatever. Okay.

Well, Erica's father had won the Fantasy 5.

Q Who is that?

A Earl Fields. He had won the Fantasy 5 in '90, and he also won at least – we went to Atlantic City.

[p. 29] Q How much did he win in 1990?

A I think it was either, and I'm not exactly sure, I'm sure it's on record, though, either $167,000 or $267,000 in '90 on the Fantasy 5.

And June '91 when we went to Atlantic City I'm sure he won at least a hundred thousand dollars.

We always stayed at Caesar's, too. We always stay at Caesar's Palace. I'm sure they have records there.

Q What does he do for a living?

A He's a gambler, and owns some property, too.

Q Where are his properties?

A I don't know his because that's not something I have to know.

Q What do you mean that's not something you don't have to know?

A He's a friend of mine. He's my daughter's father. But then those are not things I have to know.

Q So, we were talking about your downpayment and you were telling me about his winnings here. How much downpayment – did he loan you money for the downpayment?

A Yes yes, he did. He gave me some money orders and I think you all already have records of those. He gave me money orders that amounted to I think about $27,000 maybe, because one of them I thought – I was thinking I had gotten as a business venture from a partner that we [p. 30] have been in business since 1976, Code 19, John Price, I thought, but I thought he was just giving me something back from the business since I had never gotten any money from our business venture initially.

But I came to find out that he was just repaying a loan to Earl Fields is how I ended up getting that.

Q Tell me a little bit about Code 19 and how you got involved with John Price in that business.

A John had always worked as a clothing person. And John had always dressed nice. He had – I only met him after coming to Jacksonville because, remember, I was born and raised in Baldwin.

He had worked for – at somebody's store for years and years and years, and he convinced me that he knew

the clothing business so well that with just a few thousand dollars invested that we could start from scratch and really make some money. We never did.

Q Did you give him a few thousand dollars to start the business?

A Yes.

Q Where did you get that money from?

A From my savings. We are talking about back in 1976.

MS. INNIS-THOMPSON: I thought you had a question. I am sorry.

[p. 31] BY MS. INNIS-THOMPSON:

Q You have never received a profit from that business?

A Never. Never.

Q So it's been in existence since 1976?

A Yes.

Q Where was it originally located?

A Downtown. Then we thought the move to – and it did pretty good but then you know how you leave the monies in when you are doing okay, and you figure that eventually it will make some money and then you will get something back, but we never did. Never did.

Q Who paid for the overhead expenses like electricity and –

A The store.

Q – stock?

A Store.

Q The store paid for all that?

A Yes. It used to do pretty good. I guess the economy has a lot to do with all businesses now because it hasn't made any money basically.

Q Where is it located now?

A It's now located at Moncrief Road, 4671 Moncrief.

Q And we did speak to Mr. Price and he tells us that a lot of the business is done somewhat even on credit, [p. 32] is that true?

A Um-hum. Yes.

Q And right now is the store paying for itself?

A No. I think the only thing it's doing basically is keeping the lights on most of the time. The lights have been off and the phone has been off.

Q Who is paying for it?

A What?

Q Who is paying for the other expenses like Mr. Price's salary and the stock that's in there?

A He's not getting any salary. He's just still trying to do what he – all he has known to do for all of his life. And he doesn't know – I think he's even been trying to even get a little part-time or side jobs, but then you will really have to ask John.

Q Who pays the rent?

A On the properties?

Q That it's in right now?

A I don't even know that he's even paying any rent in it right now. But then I have been known to help some if he ever needed it. But then I don't think he's even paying rent there now.

Q Is your name on the lease or is his name?

A I don't know that he truly has a lease lease per se, but we just couldn't afford the rents out at Gateway [p. 33] any longer and we were fooling ourselves trying to stay out there.

Q So, Mr. Price made all the arrangements as far as the new facility, the new building that it's in?

A Yes.

Q Well, now, let's get back a little bit to your daughter, Erica. You said that her father, Earl Fields, provided support for her. He always has?

A Um-hum.

Q How much support does he provide?

A I don't know that there is any set number. As I told Mr. Stull, he has always paid for tuition, he has always paid her child care, he has always bought all of her clothes, and I don't know that I could set an amount.

Mr. Stull was determined that I needed to, that I had to, but I can't. He tried to say, "Well, okay, what?"

Like I said, if he – he supports my daughter fully.

Q You said tuition. Is your daughter in college?

A No, she's in private school.

Q What school?

A She's been in private school. She is at Episcopal High School.

Q How much is the tuition there a year?

A It's now $5,000.

[p. 34] Q Earl Fields pays for that?

A Yes.

Q Everything else concerning your daughter he pays for?

A Yes.

Q Does he give you any monies in support for yourself?

A No I mean, if I have ever asked for anything but, as I told Mr. Stull, I mean, I couldn't put an amount on anything. I mean, if I asked him. for something that I need, he will give it to me, but I can't give you a monthly amount, a weekly amount, an annual amount at all.

Q When he pays for your daughter in supporting your daughter, is it cash monies that he gives to you or does he give you a check or does he give it to your daughter, how does that work?

A He only gives me the cash to pay the tuition.

Q And the other things that she needs, general –

A He buys her clothes.

Q He buys it?

A He has always bought her clothes, yes. He buys them at the beginning of the school year and at Christmastime. And if my daughter wants more betwixt and between, he does that, too.

Q None of this money comes directly to you to do it [p. 35] for her?

A Right. Right.

Q Does he live with you?

A At times.

Q What do you mean by that?

A That he does if he wants to.

Q Where does he live when he's not living with you?

A I don't really know.

Q How often does he want to live with you?

A He's there probably, let's say, sometimes he's there for two or three days, sometimes he's there for twice a month, sometimes he's there once a month. It varies. We are talking about a relationship that's gone back 16, 17 years, and it's okay with me.

Q Do you know any of Mr. Fields' associates, any of his friends?

A Most of the people that I know are also his friends, too.

Q Do you know if he's friendly with Emory Robinson?

A What?

Q Emory Robinson?

A Do I know if he's friends with him?

Q Yes.

A Oh, sure.

Q How about Coach Weathersbee?

[p. 36] A Sure.

Q Larry Toney?

A Sure. Why am I being asked these things?

Q I'm just wondering if you know his friends, and his relationship to any of these people.

Do you know if he's close friends with any of these people?

A I don't know how much but I know that he knows them all.

Q When he's in town, he says [sic] at the house with you on Moore Street?

A If he wants to.

Q Have you ever had Emory Robinson or Coach Weathersbee or Larry Toney over at this house?

A No, but they could come by if they wanted and they knew that and they know that.

Q Did Larry Toney – what does he do for a living, do you know?

A I don't know. You will have to ask him.

Q I think that he's a real estate broker. Did he help you in finding this piece of property on Moore Street?

A Oh, sure, sure.

Q You didn't know what he did at the time, he just helped you out in finding the property?

A What do you mean?

[p. 37] Q You just told me you didn't know what he did for a living. And I said that he helped you find –

A You keep asking me about everybody else. I thought all of this that you were going to be asking was going to be about me. I know all the answers to anything about me.

Q Right.

A I just don't know what anybody else does. I don't know what anybody else supposedly does for a living. Those things you will have to ask those people. But I'm saying to you, though, yes, he did help me find the property.

Q Do you know if he's a real estate broker?

A I don't know that he's a real estate broker. I know that he's helped me to find properties but I don't know that he's a broker. I think there are agents, I think there are brokers, I think there are a lot of different kinds of things. I'm not sure exactly what he is.

Q What other properties have you listed here before that he helped you to find? Did he help you find the property on Moncrief Road?

A No.

Q Hunt Street?

A Yes.

Q Cecilia Street?

[p. 38] A Yes.

Q Sixth Avenue?

A No.

Q And he did help you with this Moore Street address?

A Yes.

Q Now, do you know whether Earl Fields is a drug dealer?

A I don't know that.

Q Other than his gambling, his gambling is the only thing that you know that he does for a living?

A Yes.

Q Have you ever heard around town that he has a reputation for being a drug dealer?

A I have heard that said but, as I told Bill Stull, anybody black that seemingly does okay and that people don't supposedly know what they do, it's almost always considered that that's what you are.

Q But isn't he also known around town as a gambler?

A Yes.

Q So, people could assume that he's just a gambler, not a drug dealer?

A Could, but that's not what most people assume.

Q Does he live in town here? Does he live in Jacksonville?

[p. 39] A When he's in town the times that I see him, he does stay with me, but I don't know where else he lives when he's not with me.

Q When you heard that he may be a drug dealer, did this concern you at all?

A No.

Q And the money that you said he loaned you for the downpayment on the house, I don't think –

A It wasn't loaned.

Q He gave it?

A It was given.

Q I don't think you gave me an amount on that. Approximately how much was that?

A The money orders were there. Mr. Stull has a record.

Q Can you tell me now? I don't have a record of them right here.

A See, then you are – you may say I said the exact wrong number.

Q Give me an approximate amount, please.

A Probably about $25- to $27-.

Q Thousand?

A Yes.

Q Was this used for the initial purchase or for the improvements?

[p. 40] A The initial purchase, because I felt that I had enough monies for the improvements that I intended making.

Q Did you ask him where he got that money from?

A No, because I knew that he had gotten that monies from the winnings from Fantasy 5. And with him having that much money, I would easily expect that somebody that means something to me would give me at least that much of that.

Q Those money orders, were they purchased in his name or in other people's names?

A I'm not even sure. Larry Toney showed up with them. So, like I said, it wasn't even anything I was that concerned about. I knew he was going to be responsible for X number, X amount, and I was going to be responsible for the remainder, so I don't even know.

Q Did you ever look at them?

A Not really because I was so excited about closing, it really didn't matter.

Q So, other than this money that Mr. Fields gave you for the initial purchase of your house and his support of your daughter, which you can't put any round figure on, but can you estimate how much it cost your daughter to survive on a yearly basis in the lifestyle the way she is accustomed?

A No.

Q Would it be $20,000, $30,000?

[p. 41] A I don't know.

Q Does your daughter own any real estate?

A Yes, she does. She and her brother.

Q Where is that?

A It's Marlboro Avenue. She – and I don't know when it was purchased either because what I did was started assuming the – receiving the rents and paying the mortgage, and I've been filing with it since it was – since I learned of the property.

Q You said her and her brother. Is that your older son, the 25-year-old?

A No, it's a son that Earl Fields has. Earl Fields and Erica Fields are on the property.

Q Who purchased that property?

A Earl Fields did.

Q Her brother is Earl Fields? His name is also Earl Fields?

A Yes.

Q Earl Fields, Sr., purchased the property?

A Yes.

Q How much rent do you get off of that property?

A $300.

Q Where is that located? Well, you told me Marlboro Avenue. Is that on the Northside?

A Yes. On the Northside. It's – since I assumed [p. 42] it, I have been filing income taxes with it.

Q Now let's go to the documents. I know you received a subpoena to appear here and to bring some documents. Can you just go through, you don't have to go through each document. Give us a general idea of what –

A What I have?

Q What you brought, yes.

A These are some receipts for things that were bought for the house. I think it's cement, it's windows for the house, it's things for the house, it's materials, wood, doors, there are things I don't understand either, framework, lumber, more lumber, brick, windows. Is that enough of those?

Q Those are all the receipts for things from the house?

A Yes, that's all that's in this envelope.

Q All right.

A Okay. Then I have here some – you asked that I bring my credit unions, my savings accounts, my bank

accounts and of course my son's is closed because after he went off to college, then we used his savings that I had for him, but my daughter's, too, it's my daughter's savings. I've been saving for her either $25 biweekly or it's now increased to $50 biweekly for my daughter that goes into her savings hopefully for college, too.

[p. 43] Q Now –

A I'll –

Q is your paycheck directly deposited?

A Yes, and I brought those as well, too.

Q Okay.

A You will see, too, what comes out. You could see, too, what comes out of these. These are my pay stubs and they happened to be in my desk drawer, is the only reason I have them all. They go back to '89 that will show that either, what, $200, $300 or $500 the last few years before I bought the house that was being saved every two weeks, but anyway I have those, too.

Q Any cash amounts that are going into your account other than your paycheck, where would those monies come from?

A Cash amounts were going? They would be going – no, the check amounts were usually going into – check amounts were usually from my rental properties because they are handled by Foland And Higbee.

Normally they will take out their portion and send me the check. And, of course, also the HUD amounts, too, are checks that would usually go in.

But if it was a cash amount, it either could be that – it could be that Earl might have given me an amount or it could be that I have won Fantasy 5 – not Fantasy. [p. 44] I've won Cash 3 before for $2400 or a thousand or whatever. That's neither here nor there. Could be any of that.

Q But you don't recall any specific times that Earl gave you cash that you put in your account?

A Well, I'm sure that he gave me something after we won at Atlantic City in '91 in June because he didn't go what us in '92. '91. Because at least when he won the $100,000, I'm sure that he gave me some monies, but I can't be exact of the amount.

Q Did you have any other documents that you brought with you?

A No.

Q Okay. If you would turn those over.

MS. INNIS-THOMPSON: Mr. Foreman, I would ask you if you would have her turn the documents over, please, to Mr. Stull on behalf of the Grand Jury.

BY MS. INNIS-THOMPSON:

Q Back to your house for a second. Is it furnished already?

A Somewhat.

Q How much did that cost?

A Probably close to $20- to $30,000 maybe.

Q Where did that money come from?

A I had run out of monies so I mortgaged – remortgaged the house and got $47,000.

[p. 45] Q So, even with that mortgage on the property right now it's still worth about $150,000 or –

A Sure, sure, it's still worth that anyway.

Q With the mortgage if that was paid off, it will be about a $200,000 piece of property you would say?

A I don't know.

Q Well, it would be $150- plus $47- so I was rounding it off.

A I don't understand that so I don't know.

Q Would you say, you just told me it's worth $150 with that mortgage?

A No.

Q That is approximating.

A Right. I'm not sure.

Q According to your approximations, if you add that mortgaged amount and you didn't have the mortgage, that would be $150- plus $47- so it would be close to $200,000 according to your approximation that the property that you now live on is worth?

A See, that's not the impression I got. I thought you just asked what do I think the house is – the property is worth. I'm saying to you it's worth $150,000 as far as I know, period.

Q What about the house and the property, how much would that –

[p. 46] A I'd still say $150,000, period.

Q Okay. That's what I was trying to find out.

A Yes.

MS. INNIS-THOMPSON: I have nothing further. Does any member of the Grand Jury have any questions?

A JUROR: I have a few. Ms. Johnson, on your property there, the last you were speaking of on Moore Avenue, what are the taxes paid on that for 1992?

THE WITNESS: That's the ones that are due now?

A JUROR: Yes.

THE WITNESS: I haven't paid them yet.

A JUROR: Do you have an appraisal on the property yet?

THE WITNESS: No.

A JUROR: What is the '91 appraisal?

THE WITNESS: $90,000, I think.

A JUROR: When is the last time you saw Mr. Fields?

THE WITNESS: Yesterday.

A JUROR: Okay. When he's not staying with you, how do you reach him if you need to get in touch with him?

THE WITNESS: I do have an emergency number if he is out of town, and I've given that number to [p. 47] Mr. Stull.

A JUROR: Thank you.

THE WITNESS: You are welcome.

BY MS. INNIS-THOMPSON:

Q Does he know that you are here today, Mr. Fields?

A Yes.

MS. INNIS-THOMPSON: Any other questions?

A JUROR: I just have one. I probably just skipped over it. What are you paying in mortgage on the Moore Street property?

THE WITNESS: It was never asked. $874.

A JUROR: $874 a month?

THE WITNESS: Yes. It was a large jump from $117. And then the first mortgage originally, the one that I sold, was $636.

A JUROR: What is the mortgage on the Marlboro Avenue property and what is the mortgage –

THE WITNESS: The mortgage on the Marlboro is $268. But then the rental received is $300.

A JUROR: Thank you.

MS. INNIS-THOMPSON: Anything else?

GRAND JURORS: (No response)

MS. INNIS-THOMPSON: Thank you. You may be excused for today.

THE WITNESS: Thank you.

[p. 48] (Witness excused at 3:01 p.m.)

[p. 49] CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Noel S. Seiler, Registered Professional Reporter, CM, do hereby certify that I was authorized to and did report stenographically and electronically the proceedings in the above-entitled matter, and that the foregoing pages, numbered 1 through 48, inclusive, constitute a true and correct transcription of said stenograph notes.

I further certify that the witness was placed under oath by the Foreman of the Grand Jury in my presence.

WITNESS my signature at Jacksonville, Duval County, Florida, this 9th day of April, A.D., 1993.

/s/Noel S. Seiler, RPR CM
NOEL S. SEILER, Registered Professional Reporter, CM

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA	:	CASE NO. 94-54-Cr-J-20
-vs-	:	
JOYCE B. JOHNSON,	:	Courtroom Number One
Defendant.	:	9:00 a.m.
	:	December 6, 1994

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
before
THE HONORABLE HARVEY E. SCHLESINGER
United States District Judge

APPEARANCES:

For the Government:	ERNST D. MUELLER, Esquire Assistant United States Attorney Post Office Box 600 Jacksonville, Florida 32201
For the Defendant:	WILLIAM J. SHEPPARD, Esquire 215 Washington Street Jacksonville, Florida 32202
Also Present:	JOYCE B. JOHNSON, Defendant BELINDA JOHNS, Special Agent Federal Bureau of Investigation
Court Reporter:	EVELYN G. ALDERMAN, RPR Post Office Box 244 Jacksonville, Florida 32201

(Proceedings reported by microprocessor stenography; transcript prepared by computer.)

• • •

[p. 162] CHARLES W. STULL, JR.,

called as a witness by the Government, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MUELLER:

Q Agent Stull, what is your profession – pardon me. Mr. Stull, what is your occupation or profession?

A Presently I'm self-employed as a private investigator, security consultant.

Q How long have you been doing that?

A Since August 13th of this year.

Q What did you do before that?

A Before that I spent twenty-five years as Special Agent [p. 163] with the Federal Bureau of Investigation, the last fourteen of which I spent working in the Jacksonville office.

Q And Agent Stull, did you have occasion to investigate during the time period of March 1993 and prior thereto an individual named Earl Fields?

A Yes, I did.

Q Can you just briefly describe the nature of that investigation?

A The nature of that investigation involving Mr. Fields was one of investigating illegal activity in cocaine

and marijuana. It also included the proceeds from that type of conduct, the cash, what happened to the cash that was involved in these illegal activities.

Q Now, Agent Stull, in that connection, did you have occasion to serve a grand jury subpoena on an individual named Joyce Johnson?

A Yes, sir, I did. I served a federal grand jury subpoena on Ms. Johnson, I believe it was on March 19th,. . . .

* * *

[p. 181] BENJAMIN W. MIXON,

called as a witness by the Government, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MUELLER:

* * *

[p. 183] Q Now, Mr. Mixon, do you recall what it was that the grand jury was investigating on the particular occasion when she appeared?

A Yes, we were investigating an alleged drug operation or distribution of narcotics at the time for an individual named Earl James –

THE COURT: Wait one second.

THE WITNESS: Fields.

THE COURT: Wait. Slow down.

(At the sidebar.)

MR. SHEPPARD: Your Honor, this is an improper matter for the jury. It goes to materiality and that's a matter for the Court, and I object.

MR. MUELLER: Well, frankly, I think we're – I mean I was not going to ask another question on this subject –

MR. SHEPPARD: And I'd ask it be stricken.

[p. 184] MR. MUELLER: – but I think I'm entitled to bring out what it was.

THE COURT: I'll overrule the objection.

(In open court.)

THE COURT: Go ahead. If you want to repeat your answer.

BY MR. MUELLER:

Q I was going to ask him if he had completed his answer.

A I had completed my answer.

Q All right. And have you ever heard the term money laundering?

A Yes, I have.

MR. SHEPPARD: Same objection.

THE COURT: Overruled.

BY MR. MUELLER:

Q Is that something which the grand jury was investigating on that occasion?

A Yes, it was. It was.

* * *

IN THE UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA	Jacksonville, Florida
Plaintiff,	Case No. 94-54-Cr-J-20
-vs-	December 7, 1994
	10:35 A.M.
JOYCE B. JOHNSON,	Courtroom Number 1
Defendant.	

VOLUME 2 A

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE HARVEY E. SCHLESINGER, UNITED STATES DISTRICT JUDGE and a jury

GOVERNMENT COUNSEL:

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Jacksonville, Florida 32202

DEFENSE COUNSEL:

WILLIAM J. SHEPPARD and ADAM B. ALLEN
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Court Reporter:

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P.O. Box 1196
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(904) 356-1985

(Proceedings reported by microprocessor stenography; transcript produced by computer.)

* * *

[p. 112] THE COURT: With respect to this particular offense, there are only three essential elements that the Court need to consider and that the jury would have to consider in this case because materiality is one that I have to do on my own, and that is that the testimony was given while the defendant was under oath as a witness before the grand jury, as [p. 113] charged. And I find that there is sufficient evidence for the jury to make a determination as to whether she was or she wasn't, based upon the testimony of the foreman of the grand jury and the court reporter.

The second element is that such testimony was false in one or more ways charged concerning some material matter in the grand jury proceeding. And the question that I pointed to, and what they're specifically speaking of in this particular indictment, "It was given to me by this man that had already paid my four-year tuition in college." Then on page 4, "The matter that I mentioned about the date. Yes."

And there's also alleged that the amount between 80 and $120,000 is not true. And the answer above that, "Well, see, I'm not really sure exactly how much it was because it was given to us, it was given to us in a box and it was basically for my mom," et cetera, et cetera. That's the alleged false statement.

And then on page 5 it's alleged, where the question was, "So where was this $80,000 once – after your mother died, where did you keep the money?"

The answer is, "I just kept it in a closet like my mom did," is alleged to be false.

And on the following page 6 in response to the question, "So you have this $80,000 or more?" Answer is alleged to be false, "80 – or more."

[p. 114] And then at the bottom of the page, "You said you were not sure how much these improvements cost you?"

Answer: "No, but it cost all the monies that my mother left me. That was all that was used, so I'd say, and I'm only guessing, I'd say roughly the $80,000 to $120,000."

That's the alleged false statements.

There is sufficient evidence that's been submitted by the prosecutor with respect to the death date of Mr. Talcott and the dates that the defense contends that the money and the grand jury testimony was provided. Also, the will may have some circumstantial bearing on whether there was any monies that were given. I found the will very interesting where he left a lawn swing and the blacksmith anvil to his friends. I gathered that was his worldly possessions or something that he cherished enough to leave to others.

With respect to the question of materiality in the second element, that's something for the Court to determine, and I'll make a factual finding and a legal finding at this juncture. The testimony of the foreman of the grand jury, in the indictment itself, in the ways and means portion of paragraph (a) says that what they were investigating at the time was alleged distribution of

cocaine and marijuana by Mr. Fields and the disposition of the money which was the proceeds of that business, including the possible concealment [p. 115] of the proceeds as investments in real estate. And with respect to monies that Mr. Fields may have given to Ms. Johnson to either purchase the home or to reconstruct the home, I conclude would be within the purview of information that the grand jury may have been looking at in order to continue their investigation or conduct their investigation on Mr. Fields.

* * *

GOVERNMENT'S REQUESTED INSTRUCTION NO. 7

43
False Declaration
(Before Grand Jury)
18 USC § 1623

Title 18, United States Code, Section 1623, makes it a Federal Crime of offense for anyone to make a false statement under oath while appearing as a witness before a Federal grand jury.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the testimony was given while the Defendant was under oath as a witness before the Grand Jury of this Court as charged;

Second: That such testimony was false in one or more of the ways charged concerning some material matter in the Grand Jury proceedings; and

Third: That such false testimony was knowingly and willfully given by the Defendant as charged.

Testimony is "false" if it was untrue when it was given and was then known to be untrue by the witness or person giving it.

The "materiality" of the matter involved in the alleged false testimony is not a matter with which you are concerned, but rather is a question for the Court to decide. You are instructed that the questions asked the

Defendant, as alleged constituted material matters in the Grand Jury proceedings referred to in the indictment.

In reviewing the testimony which is charged to have been false, you should consider that testimony in the context of the series of questions asked and answers given, and the words used should be given their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness.

If you should find that a particular question was ambiguous or capable of being understood in two different ways, and that the Defendant truthfully answered one reasonable interpretation of the question under the circumstances presented, then such answer would not be false. Similarly, if you should find that the question was clear but the answer was ambiguous, and one reasonable interpretation of the answer would be truthful, then the answer would not be false.

PATTERN JURY INSTRUCTIONS – Prepared by Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, 1985.

DEFENDANT'S REQUESTED JURY INSTRUCTION
NO. 8

43
False Declaration
(Before Court) – Modified
18 USC §1623

Title 18, United States Code, Section 1623, makes it a federal crime of offense for anyone to make a false statement under oath while appearing as a witness in any proceeding before any court.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the testimony was given while the defendant was under oath as a witness before a court as charged;

Second: That such testimony was false in one or more of the ways charged concerning some material matter in the court proceedings; and

Third: That such false testimony was knowingly and willfully given by the defendant as charged.

Testimony is "false" if it was untrue when it was given and was then known to be untrue by the witness or person giving it.

The "materiality" of the matter involved in the alleged false testimony is not a matter with which you are concerned, but rather is a question for the court to decide.

You are instructed that the questions asked the defendant, as alleged, constituted material matters in the court proceedings referred to in the indictment.

In reviewing the testimony which is charged to have been false, you should consider that testimony in the context of the series of questions asked and answers given, and the words used should be given their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness.

If you should find that a particular questions [sic] was ambiguous or capable of being understood in two different ways, and that the defendants truthfully answered one reasonable interpretation of the question under the circumstances presented, then such answer would not be false. Similarly, if you should find that the question was clear but the answer was ambiguous, and one reasonable interpretation of the answer would be truthful, then the answer would not be false.

PATTERN JURY INSTRUCTIONS – Prepared by Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, 1985.

IN THE UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA	Jacksonville, Florida
Plaintiff,	Case No. 94-54-Cr-J-20
-vs-	December 8, 1994
JOYCE B. JOHNSON,	9:00 A.M.
Defendant.	Courtroom Number 1

VOLUME 3

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE HARVEY E. SCHLESINGER, UNITED STATES DISTRICT JUDGE and a jury

GOVERNMENT COUNSEL:

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DEFENSE COUNSEL:

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Court Reporter:

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(904) 356-1985

(Proceedings reported by microprocessor stenography; transcript produced by computer.)

[p. 131] CHARGE OF THE COURT

* * *

Title 18, United States Code, Section 1623, makes it a federal crime or offense for anyone to make a false statement under oath while appearing as a witness before a [p. 132] federal grand jury. The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First, that the testimony was given while the defendant was under oath as a witness before a grand jury of this Court, as charged.

Second, that such testimony was false in one or more of the ways charged, concerning some material matter in the grand jury proceeding.

And, third, that such false testimony was knowingly and willfully given by the defendant, as charged.

Testimony is false if it was untrue when it was given and was then known to be untrue by the witness or person giving it.

A statement contained within a document is false if it was untrue when used and was then known to be untrue by the person using it.

The materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned, but, rather, it is a question for the Court to decide. You are instructed that the questions asked the defendant, as alleged, constituted material matters in the grand jury proceedings referred to in the indictment.

In reviewing the testimony which is charged to have been false, you should consider that testimony in the context [p. 133] of the series of questions asked and answers given and the words used should be given their common and ordinary meaning, unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness.

If you should find that a particular question was ambiguous or capable of being understood in two different ways, and that the defendant truthfully answered one reasonable interpretation of the question under the circumstances presented, then such answer would not be false.

Similarly, if you should find that the question was clear but the answer was ambiguous and one reasonable interpretation of the answer would be truthful, then the answer would not be false.

You will note that the indictment charges that the offense was committed on or about a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used from time to time in these instructions, means that the act

[p. 134] was committed voluntarily, purposely, with the specific intent to do something the law forbids, that is, with bad purpose, either to disobey or disregard the law.

* * *

UNITED STATES DISTRICT COURT
MIDDLE District of FLORIDA

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)**
V.	
JOYCE B. JOHNSON	
(Name of Defendant)	Case Number: 94-54-Cr-J-20
	(Filed Apr. 4, 1995)
	William J. Sheppard, Esq. Defendant's Attorney

THE DEFENDANT:

__ pleaded guilty to count(s)
XX was found guilty on count(s) One of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 1623	Perjury	March 1993	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

_ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of a $50.00, for count(s) One, which shall be due X immediately _ as follows: _

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
261-94-7314

Defendant's Date of Birth:
June 17, 1947

Defendant's Mailing Address:
8063 Moore Ave.
Jacksonville, FL 32208

Defendant's Residence Address:
8063 Moore Ave.
Jacksonville, FL 32208

March 31, 1995
Date of imposition of Sentence

/s/ Harvey E. Schlesinger
Signature of Judicial Officer

HARVEY E. SCHLESINGER,
U.S. District Judge
Name & Title of Judicial Officer

April 3, 1995
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY (30) MONTHS

__ The court makes the following recommendations to the Bureau of Prisons:

__ The defendant is remanded to the custody of the United States marshal.

__ The defendant shall surrender to the United States marshal for this district,
__ at _____ a.m. p.m. on _____
__ as notified by the United States marshal.

XX The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

X before 2 p.m. on June 9, 1995.
_ as notified by the United States Marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

_ Defendant shall participate in the Home Detention program for a period of _____ days/months. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring

procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

_ Defendant shall participate as directed in a program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

_ Defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

X Defendant shall provide the Probation Office access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime, in addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $30,000.00. The fine includes any costs of incarceration and/or supervision.

XX This amount is the total of the fines imposed on individual counts, as follows:
One of the Indictment.

___ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

_ The interest requirement is waived.
_ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

X in full immediately.

_ in full not later than _____.
_ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

_ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guidelines application in the presentence report.

OR

[ ] The court adopts the factual findings and guidelines application in the presentence report except (see attachment, if necessary);

Guideline Range Determined by the Court:

Total Offense Level: _____
Criminal History Category: _____
Imprisonment Range: ___ to ____ months
Supervised Release Range: ___ to ___ years
Fine Range: $_____ to $_____

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2417

D.C. Docket No. 94-54-Cr-J-20

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOYCE B. JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 19, 1996)

Before ANDERSON and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

ANDERSON, Circuit Judge:

On December 9, 1994, a jury convicted defendant-appellant Joyce B. Johnson of perjury in violation of 18 U.S.C. § 1623. The district court sentenced Johnson to 30 months in prison. On appeal from that conviction, Johnson raises a number of claims, all of which we find to be without merit and to warrant no discussion, with the exception of her claim regarding the trial court's instruction to the jury regarding the materiality element of the

perjury count. Because we find that the trial court's erroneous instruction does not rise to the level of plain error, we affirm Johnson's conviction and sentence.

Johnson had a long-term relationship with Earl James Fields, who in the late 1980s was the focus of a federal investigation into alleged cocaine trafficking involving Fields and another man, Willie Bennett. That investigation revealed that Bennett and Fields netted around $10 million from their trafficking activities. In 1993, federal investigators and a federal grand jury began a search for that money. To this end, Johnson was called to testify before the grand jury on March 25, 1993. Johnson testified that she was employed by the Florida Department of Health and Rehabilitative Services at an annual salary of $34,000. She also testified that she owned five real properties, including her house, to which she had added considerable improvements. Those improvements raised the appraised value of the property from $75,600 when Johnson purchased it in 1991 to $344,800 in 1993. Johnson insisted before the grand jury that she received the money for the improvements, which she asserted amounted to between $80,000 and $120,000 from a friend of her mother.

Johnson was indicted for perjury as a result of her testimony before the grand jury. It was revealed at Johnson's subsequent trial that Fields negotiated the purchase of Johnson's home from its previous owner. Johnson paid for the property with eight different cashier's checks, including two checks from a corporation in which Fields had an interest.

At the close of Johnson's trial, the trial judge charged the jury that the element of materiality in the crime of perjury is a question for the judge to decide. Accordingly, the judge instructed the jury that Johnson's statements to the grand jury were material to the grand jury's investigation. Johnson did not object to this instruction. In fact, when the United States began to present evidence concerning materiality during the trial, Johnson's counsel objected, insisting that materiality was a matter for the trial judge and not the jury. The Assistant United States Attorney attempted to question the grand jury foreman about the nature of the grand jury's investigation, and specifically about Fields' narcotics distribution and money laundering activities. At that point, Johnson's counsel stated, "Your honor, this is an improper matter for the jury. It goes to materiality and that's a matter for the Court, and I object." This objection was overruled.[1]

The Untied States Supreme Court has subsequently ruled that the materiality of false statements is an issue for the jury, not the judge. *United States v. Gaudin*, ___ U.S.

[1] It could be argued that Johnson invited the district court's error in this case by insisting that the materiality determination be made by the court. *See United States v. Chandler*, 996 F.2d 1073, 1084 (11th Cir. 1993) (because defendant argued for and submitted jury instruction at issue, he invited the error contained therein and cannot on appeal complain that the instruction was erroneous); *United States v. Hill*, 500 F.2d 733, 738 (5th Cir. 1974) (particular jury instruction alleged on appeal to the erroneous was invited error because defense requested that instruction). It is likely that Johnson's counsel did not want this evidence before the jury, because it would hurt Johnson's case. However, because we find that the district court did not commit plain error, we need not reach the issue of invited error.

___, 115 S.Ct. 2310 (1995). This is true of prosecutions for perjury under § 1623. *See Porat v. United States*, ___ U.S. ___, 115 S.Ct. 2604 (1995). However, because Johnson did not object at trial to the district court's determination of the materiality issue, we review the district court's decision to reserve the materiality determination for itself for plain error. *United States v. Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996); *see also* Fed. Rule Crim. P. 52(b); *United States v. Olano*, ___ U.S. ___, 113 S.Ct. 1770, 1777 (1993).

The Supreme Court's decision in *Olano* sets forth a three-part test for clear error determinations. Reviewing courts must investigate: (1) if there was indeed error, (2) if that error was plain (i.e. clear or obvious), and (3) if that plain error affected "substantial rights." *Id.* at 1777-1778; *United States v. Stevenson*, 68 F.3d 1292 (11th Cir. 1995). If we find clear error that affects Johnson's "substantial rights," we have the discretion to remedy the district court's error. *Olano*, 113 S.Ct. at 1779. That discretion is to be exercised when "a miscarriage of justice would otherwise result," such that "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotations omitted).

We conclude that the trial court's error in this case does not satisfy the three-part test set forth above. Assuming *arguendo* that the district court's error was clear or obvious, we hold that it did not affect the "substantial rights" of the defendant. To implicate "substantial rights," an error must have been prejudicial such that it affected the outcome of the original trial. *Id.* at 1777-1778; *Kramer*, 73 F.3d at 1074. Johnson bears the burden of persuasion with respect to the determination of prejudice. *Olano*, 113 S.Ct. at 1778; *Kramer*, 73 F.3d at 1074

n. 17; *see also United States v. Chandler*, 996 F.2d 1073, 1087 (11th Cir. 1993). Normally this requires that the appellant make a specific showing of prejudice. *Olano*, 113 S.Ct. at 1778.

After reviewing the record in this case, we find overwhelming evidence of the materiality of Johnson's statements. The focus of the grand jury's investigation was the whereabouts of the proceeds from Fields' drug trafficking activities. There was substantial evidence that Johnson, and specifically her house, was one of the avenues through which Fields laundered that money. No reasonable juror could conclude that Johnson's false statements about the source of the money used to purchase and renovate her house were not material to the grand jury's investigation. Therefore, Johnson's conviction for perjury is affirmed.

AFFIRMED.

(H)

No. 96-203

In The

Supreme Court of the United States

October Term, 1996

JOYCE B. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE PETITIONER

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H9 p2

QUESTIONS PRESENTED

1. Is reversal of a perjury conviction required where the trial judge, not the jury, decides the essential element of materiality?

2. In what manner is *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), to be applied to cases then on direct appeal in circuits where a *Gaudin*-type objection would have been frivolous at the time of trial?

3. Does *Sullivan v. Louisiana*, 508 U.S. 275 (1993), limit the holding of *United States v. Olano*, 507 U.S. 725 (1993)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, (Jt. App. 84-88), but the judgment of affirmance without published opinion is noted at 82 F.3d 429 (table).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment on March 19, 1996. The Petition for Rehearing was denied June 11, 1996, (Pet. App. 10a-11a), and the Petition for Writ of Certiorari was filed on August 5, 1996. Certiorari was granted on November 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of Article III and of the Fifth and Sixth Amendments to the Constitution of the United States. Article III, Section 2, Clause 3 provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

The Fifth Amendment provides, in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

STATEMENT OF THE CASE

On March 19, 1993, the petitioner was served with a subpoena to testify before a United States grand jury. Jt. App. 59-60. The grand jury was investigating allegations that an individual named Earl Fields was involved in unlawful cocaine and marijuana transactions and was inquiring as to the disposition of cash proceeds of Fields' unlawful activities. Jt. App. 59-62. On March 25, 1993, the petitioner appeared before the grand jury. Jt. App. 14-15.

The petitioner, Joyce B. Johnson, at the time was employed as recruitment supervisor for a seven-county district by a State of Florida social services agency for which she had worked for 26 years. Jt. App. 17; Tr. (sentencing) 70. Ms. Johnson has two children, including a teenaged daughter of Mr. Fields'. Jt. App. 17, 38-39, 42-44.

During her appearance before the grand jury, the petitioner was questioned about residential property where she lived on Moore Avenue in Jacksonville, Florida. Jt. App. 17, 21-22. Ms. Johnson bought the property in 1991 and subsequently improved the house on the property. Jt. App. 22. Ms. Johnson told the grand jury that the funds used to improve the house were given to her and her mother "back in probably '85, '86" by Gerald Talcott, a Canadian whose wallet her mother had found

and returned and who subsequently corresponded with Ms. Johnson's mother and provided financial assistance to Ms. Johnson, including to fund her college education. Jt. App. 22-24. Ms. Johnson told the grand jury that she was not sure how much money Talcott had given to her and her mother during the mid-1980s; she approximated the amount to have been between about $80,000.00 and $120,000.00, although she added that she was "not even sure" about the amount. Jt. App. 24-25. After Ms. Johnson's mother died in 1990 of cancer, Ms. Johnson became the beneficiary of the money given by Mr. Talcott, she told the grand jury. Jt. App. 27-28.

Ms. Johnson also told the grand jury that she assembled funds for the purchase of the Moore Avenue property from various sources, including by assuming a mortgage, withdrawing funds from savings accounts, proceeds from a personal injury recovery and from Mr. Fields. Jt. App. 32-38. She acknowledged to the grand jury that she thought about $27,000.00 of the funds toward the down payment for purchase of the property came from Fields. Jt. App. 39, 48-49. Ms. Johnson was asked a number of other questions during her grand jury appearance, (Jt. App. 14-57), including what, if anything, she knew about what Fields did to earn a living. Jt. App. 47-48.

More than one year later, on March 29, 1994, Ms. Johnson was indicted on a single count of perjury under 18 U.S.C. §1623 on the basis of her statements before the grand jury regarding funding for the improvements to the Moore Avenue property. Jt. App. 5-13. The indictment included certain excerpts of Ms. Johnson's statements before the grand jury, with emphasis supplied on the face of the indictment as to which statements were alleged to

have been knowingly and willfully false and material. Jt. App. 6. The statements alleged in the indictment to have been false and material were:

> The monies that I put into it [improvements] was monies that was given to my mom and me back in probably '85, '86. . . .
>
> * * *
>
> It was given to me by the same man that has already paid my four years' tuition to college. . . .
>
> * * *
>
> Well, see, I'm not really sure exactly how much it was because it was given to us – it was given to us in a box and it was basically for my mom, for her and her livelihood, because he was talking about how hard she had had it, how hard she had worked, and the fact that he just wanted her to be sure she did all right.
>
> And, like I said, if I said to you exactly how much it was, I would be lying to you. . . .
>
> * * *
>
> Approximately maybe from $80-$120,000 maybe. I'm not even sure.
>
> Q: That was back in '85 or '86?
>
> A: Yes . . .
>
> * * *
>
> Q: Your mother was still living in Baldwin when she got the money?
>
> A: Yes. . . .

> * * *
>
> Q: So, this money was given to her you said '85, '86?
>
> A: Yes. . . .
>
> * * *
>
> I just kept it in a closet like my mom did. . . .
>
> * * *
>
> $80 – or more. . . .
>
> * * *
>
> Q: You said you are not sure how much those improvements cost you?
>
> A: No, but it cost all of the monies that my mother left me. That was – all of that was used. So I'd say, and I'm only guessing, I'd say roughly the $80-to $120. . . .

Jt. App. 7, 9-12. Ms. Johnson was not charged with having testified falsely as to any other statements she made during her almost one-hour grand jury appearance. Jt. App. 5-13, 14, 57. She was not charged with making any false statement regarding the purchase of the Moore Avenue property. Nor was she charged with any other count or offense. The government presented no direct evidence at trial that Ms. Johnson did not receive, have or use money from Mr. Talcott or that any money provided by Mr. Fields was used to improve the Moore Avenue property.

At trial in December, 1994, both the Government and the petitioner proposed use of Instruction 43, relating to 18 U.S.C. §1623, of the Eleventh Circuit *Pattern Jury*

Instructions, Criminal Cases.[1] Jt. App. 67-68, 69-70. The district court followed the Eleventh Circuit's pattern. Jt. App. 71-73. In pertinent part, following the Eleventh Circuit pattern instruction, the district court instructed the jury:

> The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:
>
> First, that the testimony was given while the defendant was under oath as a witness before a grand jury of this court, as charged.
>
> Second, that such testimony was false in one or more of the ways charged, concerning some material matter in the grand jury proceeding.
>
> And, third, that such false testimony was knowingly and willfully given by the defendant, as charged.
>
> * * *
>
> *The materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned, but, rather, it is a question for the Court to decide. You are instructed that the questions asked of the defendant, as alleged, constituted material matters in the grand jury proceedings referred to in the indictment.*

Jt. App. 72 (emphasis added). The district court's instructions, withholding the element of materiality from the jury and directing the jury that the Government had

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[1] Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, *Pattern Jury Instructions, Criminal Cases* 160-161 (1985).

established materiality, conformed with clearly established circuit authority, as well as the circuit's approved pattern instruction. *See e.g., United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States v. Dudley*, 581 F.2d 1193, 1196 n.2 (5th Cir. 1978);[2] *United States v. Damato*, 554 F.2d 1371, 1373 (5th Cir. 1977); *United States v. Edmondson*, 410 F.2d 670, 673 n.3 (5th Cir.), *cert. denied*, 396 U.S. 966 (1969); *Brooks v. United States*, 253 F.2d 362, 364 (5th Cir.), *cert. denied*, 357 U.S. 927 (1958); *Blackmon v. United States*, 108 F.2d 572, 574 (5th Cir. 1940).

Earlier, while ruling on a defense motion for judgment of acquittal on December 7, 1994, the district court stated:

> With respect to this particular offense, there are only three essential elements that the court needs to consider and that the jury would have to consider in this case *because materiality is one that I have to do on my own. . . .*

Jt. App. 64 (emphasis added). The court continued:

> With respect to the question of materiality in the second element, that is something for the court to determine, and I'll make a factual finding and a legal finding at this juncture. The testimony of the foreman of the grand jury, in [sic] the indictment itself, in the ways and means portion of paragraph (a) says that what they were investigating at the time was alleged distribution of cocaine and marijuana by Mr. Fields and the

---

[2] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

> disposition of the money which was the proceeds of that business, including the possible concealment of the proceeds as investments in real estate. And with respect to monies that Mr. Fields may have given to Ms. Johnson to either purchase the home or to reconstruct the home, I conclude would be within the purview of information that the grand jury may have been looking at in order to continue their investigation or conduct their investigation on Mr. Fields.

Jt. App. 65-66.

The district court did not indicate explicitly whether it applied a standard of proof beyond a reasonable doubt but stated that materiality had been established because the petitioner's testimony "would be within the purview of information that the grand jury *may* have been looking at. . . . " Jt. App. 66 (emphasis added). Following a jury verdict of guilty (as to the elements submitted to the jury), the petitioner was sentenced on March 31, 1995, to a term of 30 months' imprisonment and 3 years' supervised release, and was fined $30,000.00. Jt. App. 75-83.

At the time of Ms. Johnson's trial, almost every circuit had held that the determination of materiality in a perjury case was an issue of law for decision by the trial judge. *See, United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting), *aff'd.*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). However, after trial and during the pendency of direct appeal in the court of appeals, the Court overruled these precedents in *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Jt. App. 86-87.

SUMMARY OF THE ARGUMENT

The constitutional right to a jury determination of all elements of a charged crime dictates reversal of the court of appeals in this case because the structural nature of the error precludes application of either Fed.R.Cr.P. 52(a) or 52(b). Judges are absolutely prohibited from directing verdicts, in whole or in part, in favor of the prosecution in a criminal case, as occurred below, where the trial judge instructed the jury that the Government had prevailed on an essential element of the offense charged. Application of a plain error or a harmless error analysis under the circumstances presented is unconstitutional.

Plain error analysis cannot be applied where clear, longstanding and binding circuit precedent dictated not only that the trial judge determine materiality but that he also determine materiality in favor of the Government. Plain error inquiry has no application where the trial court's action was not even erroneous at the time of trial under then-existing binding precedent that was conclusively overruled by this Court during the pendency of petitioner's direct appeal. Harmless error analysis cannot apply to review a factual determination that is constitutionally the exclusive domain of the jury, which never made any determination of materiality whatsoever, even indirectly. Because the jury's verdict was constitutionally incomplete, the verdict is a nullity, incapable of review for harmlessness or prejudice.

Moreover, the petitioner suffered actual prejudice affecting her substantial rights as a result of the trial judge instructing the jurors that the government had prevailed as to an essential element, infecting the entire

deliberative process on the elements submitted to the jury. The trial judge further made his finding of materiality under a standard lower than proof beyond a reasonable doubt. For all these reasons, the error at issue is structural and seriously affects the fairness, integrity and public reputation of judicial proceedings by depriving petitioner of her right to a jury decision of guilt beyond a reasonable doubt on all elements of the charged offense. Reversal is compelled by decisions of this Court and the history of the right to trial by jury. Accordingly, the judgment of the court of appeals should be reversed.

ARGUMENT

The petitioner was accused of perjury under 18 U.S.C. §1623, which penalizes knowingly making "any false *material* declaration" while under oath before a United States grand jury. 18 U.S.C. §1623(a) (emphasis added). Materiality is an explicit element of §1623. The trial judge below determined that the Government had established materiality, under a standard lower than beyond a reasonable doubt, and informed the jury of his finding. Jt. App. 65-66, 72. The determination of the element of materiality, however, must be made by the jury, as with all other essential elements of a criminal charge, beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. ___, ___, 115 S.Ct. 2310, ___, 132 L.Ed.2d 444, 458 (1995) (18 U.S.C. §1001 case). *Gaudin* requires submission of materiality to the jury in a §1623 prosecution. *Porat v. United States*, ___ U.S. ___, 115 S.Ct. 2604, 132 L.Ed.2d 849 (1995); *United States v. Keys*, 95 F.3d 874, 878 (9th Cir. 1996) (en banc). "[T]he Fifth and Sixth Amendments

require conviction by a jury of *all* elements of the crime." *Gaudin*, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 455 (emphasis in original).

The petitioner has never been convicted by a jury on all elements of the perjury charge and has not surrendered her right to a complete jury verdict. She has been denied her unequivocal right to a jury determination of whether the Government proved each element of perjury beyond a reasonable doubt. She further suffered extreme prejudice by the trial court having directed a verdict to the jury, infecting the entire deliberative process. Accordingly, the judgment of the court of appeals should be reversed.

I.

THE FUNDAMENTAL AND STRUCTURAL NATURE OF THE RIGHT TO TRIAL BY JURY UNDER A REASONABLE DOUBT STANDARD IS ESTABLISHED BY THE HISTORY OF THE RIGHT, AND DEPRIVATION OF THE RIGHT REQUIRES REVERSAL.

This case concerns the right to trial by jury in a criminal case, which dates at least to Athenian law in the fourth and fifth centuries, B.C. K. Freeman, *The Murder of Herodes and Other Trials from the Athenian Law Courts* 17-18 (1946); B. barrett, *The Code Napoleon* xcv (1811).[3] This right was introduced in England after the Norman Conquest of 1066. J. Dillon, *The Laws and Jurisprudence of England and America* 121 n.3 (1894). The right to trial by jury, and its

[3] The trial judge in this case recognized the ancient origins of the right to jury trials in criminal cases and described the right's history and importance to the venire at the beginning of the petitioner's trial. 1 Tr. 3-6.

interaction with principles of due process of law, was codified in 1215 by the Magna Charta.[4] *See Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1856) (constitutional due process standard carries same meaning as "by the law of the land" in Magna Charta).

The right of an accused to trial by jury is "the grand bulwark of his liberties." 4 W. Blackstone, *Commentaries on the Law of England* 342 (1769). The jury is a "barrier . . . between the liberties of the people, and the prerogative of the crown." *Id.* Blackstone warned that "inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." *Id.* at 344.

The right to trial by jury was so paramount that the only codified law in the Plymouth colony for its first five years read: "That all criminal facts and also all manner of trespasses and debts between man and man shall be tried by the verdict of twelve honest men, to be impanelled by authority in form of a jury upon their oath." J. Proffatt, *A Treatise on Trial by Jury* 121-22 (1877), *citing* 1 *Palfrey's New England* 340. When the Massachusetts Body of Liberties was adopted in 1641, it also secured the rights to due

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[4] "No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him, except by lawful judgment of his peers or by the law of the land." Magna Charta, Chapter 39. This right was supplemented or clarified by parliamentary enactment: "[N]o Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor put to Death, without being brought in answer by due Process of Law." 28 Edw. III, c3 (1354).

process and trial by jury and mentioned the jury trial right in six different sections because the rights to trial by jury and due process of law were being restricted by the English crown. E. Morgan, *The Puritan Dilemma* 170 (1958); D. Bodenhamer, *Fair Trial Rights of the Accused in American History* 16 (1992). Previously, the people of the colony "thought their condition very unsafe while so much power rested in the discretion of magistrates." Morgan, *supra*, at 15.

Five hundred years following Magna Charta, the English crown had restricted the right to trial by jury in the American colonies, propelling the colonies toward independence and unqualified protection of the right in the Constitution. Limitation of the jury was a critical feature at the trial of John Peter Zenger for seditious libel in 1735 and was subject to vigorous debate between the court and Zenger's counsel.

At the Zenger trial, the court ruled that the jury was restricted to determination by special verdict of whether Zenger had printed and published the papers at issue, and that the court would decide whether the matter published was libelous. L. Rutherfurd, *John Peter Zenger: His Press, His Trial* 217 (1904) (reprinting first edition of trial). As Mr. Zenger's counsel, Andrew Hamilton, argued in 1735, in pertinent part: "This leaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless (to say no worse) in many cases. . . . " *Id.* In *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the Court unequivocally resolved the question argued at Zenger's

trial in favor of a defendant's right to a general jury verdict beyond a reasonable doubt on all elements of a charged offense.

The First Continental Congress in 1774 described the right to trial by jury in paramount terms as "the great and inestimable privilege of [citizens] being tried by their peers of the vicinage." M. Bloomstein, *Verdict: The Jury System* 25 (rev. ed. 1972). The erosion of the right to trial by jury in fact was among the evils of the English crown that compelled the American colonies to revolution and independence in 1776.

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. . . . He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:. . . . *For depriving us in many cases, of the benefits of trial by jury*. . . .

Declaration of Independence (1776) (emphasis added).

In the same year, the Virginia Declaration of Rights proclaimed the right recognized in Magna Charta to due process of law and trial by jury.[5] Even before the adoption of the Bill of Rights, the right to trial by jury in criminal cases was unqualifiedly a fundamental constitutional requirement. U.S. Const. art. III, §2, cl. 3 ("The Trial

[5] Virginia Declaration of Rights, Sec. 8 (1776) ("That in all capital or criminal prosecutions . . . that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.").

of all Crimes, except in Cases of Impeachment, shall be by Jury. . . . "). This unqualified right was strengthened and reemphasized by the due process and jury trial clauses of the Fifth and Sixth Amendments.

The Court has described the right to trial by jury in terms that leave no doubt as to the paramount, fundamental and structural nature of the right.

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. . . . [T]he jury trial provisions in the Federal and State Constitutions reflect *a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.* Fear of unchecked power, so typical of our State and Federal governments in other respects, found expression in the criminal law in this instance upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968) (emphasis added). In other words, this right is utterly stripped from a criminal defendant when a trial court, an appellate court or indeed even this Court considers, in the absence of a jury verdict, whether guilt has been

proved beyond a reasonable doubt where no jury has rendered a verdict of guilt on all elements of a charged offense. "Twelve good and lawful men are better judges of disputed fact than twelve learned judges." J. Dillon, *The Laws and Jurisprudence of England and America* 168 (1894).

> [W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Duncan, 391 U.S. at 157. Judicial speculation as to the weight of evidence on one or more elements never decided by a jury violates Article III, the Sixth Amendment and at times the Fifth Amendment. "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States*, 325 U.S. 607, 614 (1946).

The exceptions to the fundamental right to trial by jury in criminal cases are exceedingly narrow. Unless the charged crime is merely a petty offense, *see, e.g., Schick v. United States*, 195 U.S. 65, 68-72 (1904), the right to trial by jury in a criminal case can be abridged only by an overt, clear, informed and voluntary waiver. *See, e.g., Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942); Fed.R.Crim.P. 23(a).

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the

> court must be had, in addition to the express and intelligent consent of the defendant.

Patton v. United States, 281 U.S. 276, 312 (1930). This fundamental right cannot be surrendered by silence, accident or judicial anomaly.[6]

Even if the evidence appears overwhelming, no judge may constitutionally direct a verdict of guilty in a criminal case, even in part. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947); *Sparf & Hanson v. United States*, 156 U.S. 51, 105 (1895). The absolute right of a defendant to insist upon a jury determination of guilt, even in the face of the strongest evidence, *Carella v. California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring), certainly renders the right so fundamental as to be capable of surrender only by explicit, knowing and voluntary waiver.

The error presented in this case is even more structural and egregious than the deficient reasonable doubt instruction in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). While concurring that Sullivan's conviction should be reversed, and comparing the *Sullivan* error to that in *Rose v. Clark*, 478 U.S. 570 (1986), the Chief Justice observed that the *Sullivan* and *Rose* errors seemed less egregious than the error in the present case. "[N]either error [in

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[6] The right was considered by many so fundamental, and also so critical to public concern, as to be incapable of waiver. J. Proffatt, *A Treatise on Trial by Jury* 157 (1877); *see, Adams*, 317 U.S. at 281-286 (Douglas, J., dissenting) (questioning whether jury trial can be waived in criminal case and arguing for limitations on ability to waive jury).

Sullivan or *Rose*] removed an element of the offense from the jury's consideration. . . . " *Sullivan*, 508 U.S. at 283 (Rehnquist, C.J., concurring). In contrast, an essential element of the offense was removed from the jury's consideration in this case. Even more egregiously and prejudicially to the petitioner, the trial judge specifically informed the jury that the petitioner was guilty of an essential element, Jt. App. 72, a horrendous violation of the constitutional prohibition against directed verdicts of guilt in criminal cases. *Martin Linen*, 430 U.S. at 573; *United Brotherhood of Carpenters*, 330 U.S. at 408.

The jurisprudential underpinnings of this conclusion are unmistakably clear.

> No man should be deprived of his life under the forms of law unless *the jurors* who try him are able, upon *their* consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

In re Winship, 397 U.S. 358, 363 (1970), *quoting Davis v. United States*, 160 U.S. 469, 493 (1895) (emphasis added). The ultimate burden at trial is upon the government to "convince the trier of all the essential elements of guilt." *In re Winship*, 397 U.S. at 361 (citations and internal quotations omitted).

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the

> dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Bollenbach v. United States, 326 U.S. 607, 615 (1946). The court of appeals violated this principle by "substitut[ing] the belief of appellate judges . . . for ascertainment of guilt by a jury," *id.*, by concluding that "overwhelming" or "substantial" evidence of the materiality of the petitioner's statements before the grand jury warranted affirmance of her conviction. Jt. App. 88. The decision of the court of appeals directly contravenes clear holdings of this Court. *See, e.g., Martin Linen*, 430 U.S. at 573; *Duncan*, 391 U.S. at 155-156; *United Brotherhood of Carpenters*, 330 U.S. at 408. Accordingly, the judgment of the court of appeals should be reversed.

II.

THE *GAUDIN* ERROR IN THIS CASE IS STRUCTURAL, PRECLUDING REVIEW FOR HARMLESSNESS OR PREJUDICE UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 52.

Under the circumstances presented, review in this case may only be for reversible error, which requires reversal of Ms. Johnson's conviction. Review under a plain error or harmless error analysis under Fed.R.Cr.P. 52 is unconstitutional absent a record that shows that the jury's verdict actually rested on a jury determination of the element not only omitted from the jury's consideration but further upon which the jury was conclusively instructed by the trial court that the Government had prevailed. "[T]he Court has held it irrelevant in analyzing

a mandatory presumption, but not in analyzing a permissive one, that there is ample evidence in the record other than the presumption to support a conviction." *County Court of Ulster County v. Allen*, 442 U.S. 140, 159-160 (1979) (citations omitted). Appellate evaluation of the weight of the factual evidence presented at trial violates due process requirements of the Fifth Amendment where the jury "is forced to abide by the presumption and may not reject it based on an independent evaluation of the particular facts presented by the State." *Id.* at 159 & n.17. The due process violation is even more extreme where, as in this case, the jury is given a partial directed verdict, an instruction more forceful than most presumptions because of its conclusiveness.

Furthermore, where the jury is told by the court that the Government has prevailed on an essential element of the charged offense, there clearly exists at least a "reasonable possibility" that the directed verdict of the trial judge "might have contributed to the verdict" reached thereafter as to the elements actually submitted to the jury. *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (citations and internal quotations omitted). The jurors in the petitioner's trial clearly were subject to the influence of the trial court having directed them that the government had prevailed in part. "[T]he wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986). The jury's deliberations were subject to having been influenced by the great weight of the trial judge instructing the jurors that the Government already had won a partial victory over the petitioner even prior to the jury beginning its deliberations. This partial directed verdict in a criminal case toppled one of the structural elements of

the "framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Errors of the magnitude that occurred in the present case are "so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The rights of which the petitioner has been deprived are "safeguards essential to liberty in a government dedicated to justice under law," commanding reversal. *Cole v. Arkansas*, 333 U.S. 196, 202 (1948).

The decision and dictum in *Sinclair v. United States*, 279 U.S. 263, 298 (1929), the progeny of which withdrew the element of materiality in a perjury case from decision by the jury, not only constitutes an anomaly in the jurisprudence of the right to trial by jury but now clearly has been repudiated and overruled because of the importance of the right to trial by jury. *United States v. Gaudin*, 515 U.S. ___, ___, 115 S.Ct. ___, ___, 132 L.Ed.2d 444, 456-457 (1995).

> [I]t is precisely *historical practice* that we have relied on in concluding that the jury must find all the elements. The existence of a unique historical exception to this principle – and an *exception that reduces the power of the jury precisely when it is most important, i.e., in a prosecution not for harming another individual, but offending against the government itself* – would be so extraordinary that the evidence for it would have to be convincing indeed. It is not so.

Id. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 453 (emphasis added). That all elements of a criminal accusation must be determined by a jury is flatly required by Article III and the Fifth and Sixth Amendments. "The core

meaning of the constitutional guarantees is unambiguous." *Id.* at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 455.

Furthermore, where a fundamental, core constitutional right conflicts with an inferior provision of law, e.g., statute, rule or regulation, the courts of the United States are bound by the Constitution. Hamilton, *The Federalist*, No. 78 (1788) (judges "ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental;" rules of construction and conduct for courts are inferior to the Constitution). In other words, rules of procedure must be subordinate to conflicting constitutional mandates.

The principle that Hamilton enunciated in *The Federalist*, No. 78, that the Constitution is controlling over contradictory statutes and rules, further demonstrates the error of any conclusion that Rule 52(b) is the "sole source" of appellate authority to review errors not subject to timely objection at trial. *See, e.g., United States v. Jones*, 21 F.3d 165, 172 (7th Cir. 1994). On the contrary, the principle that certain circumstances warrant correction of trial errors even in the absence of objection at trial has a long history in American jurisprudence, predating enactment of the Federal Rules of Criminal Procedure. *See, e.g., Wiborg v. United States*, 163 U.S. 632, 658 (1896); *United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("In exceptional circumstances, especially in criminal cases, appellate courts in the public interest may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.") (citations omitted).

In fact, the function of Rule 52(a) is to convey authority to the courts to disregard errors that do not affect substantial rights; clearly, the errors in this case affect substantial rights and appellate harmless error review violates the right to trial by jury. *See, Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (constitutionally defective reasonable doubt instruction cannot be harmless). Likewise, the actual function of Rule 52(b) is to give discretion to correct unpreserved errors affecting substantial rights where a defendant is innocent or the error has a serious effect on the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 736-737 (1993). However, where either actual innocence exists, or where an error seriously and detrimentally affects the fairness, integrity or public reputation of a judicial proceeding, an appellate court should always correct such an error. The Court recognized in *Olano* that certain errors require reversal without a showing of prejudice. *Id.* at 735-737.

As a result, Rule 52 is a procedural device that provides discretion to the courts under certain circumstances. However, as noted in *Olano*, 507 U.S. at 735, a "special category" of errors require correction; this "special category" clearly encompasses structural error. Where error is structural, the error is "thus not amenable to analysis under Fed.R.Cr.P. 52." *United States v. Wiles*, ___ F.3d ___, ___ 1996 W.L. 707539, *16 (10th Cir. Dec. 10, 1996) (en banc). Where Rule 52 does not apply, neither does "the discretion [appellate courts] possess thereunder." *Id.* Accordingly, the error in this case requires reversal.

Waiver of a right is the "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (citations and internal quotations omitted). In light of

more than a half-century of judicial authority withholding materiality determinations from the jury, the petitioner cannot be said even to have known at the time of trial that she had the right to jury determination of the element. She clearly did not waive that right.

> Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntarily, all depend on the right at stake.

Id. at 733 (citations omitted). As held in *Patton* and *Adams*, *supra*, waiver of a jury trial in a criminal case at the very least must be express, affirmative, informed and voluntary, and the right cannot be waived by silence. Waiver surely cannot be found in a silent record.

Additionally, of great fundamental importance in this case, materiality long has been recognized at common law as an essential element of perjury offenses. "Sir Edward Coke wrote in 1680 that perjury is a crime committed by one 'who sweareth absolutely, and falsely in a manner *material* to the issue.' 3 E. Coke, Institutes 164 (6th ed. 1680) (emphasis added). Otherwise, as Blackstone stated, 'if it only be in some trifling collateral circumstance, to which no regard is paid, it is not penal.' 4 W. Blackstone, *Commentaries* *137." *United States v. Williams*, 12 F.3d 452, 456 n.8 (5th Cir. 1994). Because jury determination of each element of the offense is a fundamental right; because materiality is an essential element of perjury; because the right to a complete jury verdict is a structural guarantee that undergirds the entire trial process; and because even partial directed verdicts are

unconstitutional and actually prejudicial, the deprivation of the right compels reversal in this case.

Although numerous panel decisions have reached conflicting, or at least inconsistent, results in considering the issues presented in this case (*See* Pet. at 8-11), two circuits now have considered the issues en banc, and both conclude that reversal of a conviction is required under the circumstances presented in this case. *United States v. Wiles*, ___ F.3d ___, 1996 W.L. 707539 (10th Cir. Dec. 10, 1996) (en banc); *United States v. Keys*, 95 F.3d 874 (9th Cir. 1996) (en banc). Both *Wiles* and *Keys* present compelling analyses demonstrating, first, that Fed.R.Cr.P. 52(b) cannot be applied to the error presented and, second, that the error cannot be found harmless.

In *Keys*, the court of appeals concluded that holding a criminal defendant to the contemporaneous objection requirements of Fed.R.Cr.P. 30 and 52, in light of a clear change in the law following trial, "would be unconscionable." *Keys*, 95 F.3d at 879. Where the *Gaudin* error was not even error at all at the time of trial because of a "solid wall" of binding authority, a defendant cannot be deemed to have forfeited, invited or waived the issue at stake. *Id.*, *citing*, *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994). "We address on appeal such a supervening change in the law as 'error' but to process it in *Olano* 'forfeited error' (or 'invited error') terms is manifestly wrong." *Keys*, 95 F.3d at 879.[7] The mandate of *Griffith v. Kentucky*, 479 U.S.

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[7] The Government gratuitously argues in this case that the petitioner should be burdened with a Rule 52(b) standard of review for *Gaudin* error because she failed to object at trial on an issue that only after trial became legally cognizable, and that

314, 323 (1987), to apply new rules in cases not final, is inconsistent with the discretionary standard of Rule 52(b). *Keys*, 95 F.3d at 879. Further, where the record fails to establish that the jury found materiality, the error cannot be reviewed for harmlessness under Rule 52(a). *Id.* at 881. "Accordingly, because the record demonstrates that the jury did not determine the materiality of the alleged false declaration, the judgment of conviction is defective no matter how strong the evidence of guilt may be." *Id.* at 882.

In this case, the solid wall of binding authority holding that judges decide the materiality issue was almost fifty-five years old in the Eleventh and former Fifth circuits at the time of petitioner's trial. *See, e.g., United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1993); *United States v. Thompson*, 637 F.2d 267, 268 (5th Cir. 1981);[8] *United States v. Dudley*, 581 F.2d 1193, 1196 n.2 (5th Cir. 1978); *United States v. Damato*, 554 F.2d 1371, 1373 (5th Cir.

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consideration of the weight of the evidence compels affirmance of the petitioner's conviction. Brief for the United States (On Petition for Writ of Certiorari) at 4. However, the Government argues duplicitously elsewhere in this Court that it should not be held to any heightened standard of review where the *Government* was the party that failed to raise an issue related to *Gaudin* prior to *Gaudin*. Reply Brief for the United States at 6-8, *United States v. Wells*, No. 95-1228. The Government's suggestion that a defendant must be penalized on appeal, but not the Government, for failing to have raised at trial an issue that only became legally founded following trial is untenable, unfair, and violative of due process.

[8] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

1977); *United States v. Edmondson*, 410 F.2d 670, 673 n.3 (5th Cir.), *cert. denied*, 396 U.S. 966 (1969); *Brooks v. United States*, 253 F.2d 362, 364 (5th Cir.), *cert. denied*, 357 U.S. 927 (1958); *Blackmon v. United States*, 108 F.2d 572, 574 (5th Cir. 1940). Furthermore, circuit law was equally clear that the jury should be directed by the trial judge that the Government had established the materiality element. *Damato*, 554 F.2d at 1373; *Barnes v. United States*, 378 F.2d 646, 650 (5th Cir. 1967), *cert. denied*, 390 U.S. 972 (1968); *Blackmon*, 108 F.2d at 574; *see*, Committee on Pattern Jury Instructions, District Judges Association, Eleventh Circuit, *Pattern Jury Instructions, Criminal Cases* 160-161 (1985); 2 Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* 575-598 (1990 ed). The petitioner should not be penalized for failing to raise an objection that would have been utterly frivolous at the time of her trial.

Additionally, the petitioner in this case suffered the actual prejudice of having the trial court affirmatively direct a partial verdict to the jury. Jt. App. 72. The trial court told the jury that Ms. Johnson was guilty of one of the four elements of perjury. The trial court further reached its directed verdict without indicating the standard of proof to which the Government was held with respect to materiality, but indicating that the standard employed was exceedingly low. Jt. App. 65-66. In *Keys*, materiality was not even mentioned to the jury, and the jury never was advised that a partial directed verdict had occurred. *Keys*, 95 F.3d at 877. Accordingly, the Article III, Fifth Amendment and Sixth Amendment deprivations suffered by the petitioner are even more acute than the like deprivations that warranted reversal by the en banc Ninth Circuit.

Even more recently, the Tenth Circuit has rendered its en banc decision in *United States v. Wiles*, ___ F.3d ___, 1996 W.L. 707539 (10th Cir. Dec. 10, 1996). In *Wiles*, the defendants did not object to the district court determining the issue of materiality rather than submitting the element to the jury, although the defendants did object to the district court's conclusion that the government had met its burden of demonstrating materiality by the production of "some evidence." *Id.* at ___, 1996 W.L. 707539 at *9. At the time of trial in *Wiles*, Tenth Circuit precedent not only withheld the determination of materiality from the jury in 18 U.S.C. §1001 cases but also held that materiality "was a question of law for the court *'with an attendant reduction of the government's burden of proof on this issue.'* " *Id.* at ___, 1996 W.L. 707539 at *9 (emphasis added), *quoting, United States v. Daily*, 921 F.2d 994, 1003 n.9, 1004 (10th Cir. 1990), *cert. denied*, 502 U.S. 952 (1991). During the pendency of the appeals decided in *Wiles*, the Court decided *Gaudin*, and so the en banc Tenth Circuit confronted the same circumstances as presented here by the petitioner. *Wiles*, ___ F.3d at ___, 1996 W.L. 707539 at *8-*16. The court concluded that Wiles and another defendant

> did not intentionally relinquish or abandon their right to have a jury determine beyond a reasonable doubt all elements of the §1001 charges. At the time of their trials, they were not aware of this right. *See*, Fed.R.Cr.P. 51 ('if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.')."

Id. at ___, 1996 W.L. 707539 at *10. The Tenth Circuit observed that, whether the inquiry is for plain error or

harmless error under Fed.R.Cr.P. 52, the court must be able to determine whether the error affected the substantial rights of the defendant. *Id.* at ___, 1996 W.L. 707539 at *10. To make any such determination, a reviewing court "must be able to evaluate the effect of the error on the reliability of the jury verdict." *Id.* at ___, 1996 W.L. 707539 at *10, *citing, Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

However, because the consequences of the error at issue are "unquantifiable and indeterminate," the error is structural. *Wiles*, F.3d at ___, 1996 W.L. 707539 at *11, *citing, Sullivan*, 508 U.S. at 281-282. Structural error utterly defies analysis under either a harmless error or a plain error inquiry. *Id.* at ___, 1996 W.L. 707539 at *13. Furthermore, "due to the nature of structural error, whether a defendant objects (as required for Rule 52(a) analysis) or fails to object (as required for Rule 52(b) analysis) to such error at trial is simply irrelevant." *Id.* at ___, 1996 W.L. 707539 at *13. The only inquiry under which reversal can be avoided is an inquiry able to determine that the jury in some other manner necessarily found the otherwise omitted element.

> A Rule 52 standard that looks at the question of whether the jury necessarily found the element to be satisfied based upon underlying findings of fact, rather than what a hypothetical jury might have found, places the determination of the element in the 'right entity' – the jury. In other words, if the element-specific error did not prevent the jury from rendering a verdict on that element an 'object' remains upon which harmless or plain error scrutiny can operate, and thus the error is not structural.

Id. at ___, 1996 W.L. 707539 at *15 (citation omitted). The Tenth Circuit continued:

> But the essential connection between a presumption and underlying predicate facts is not present where the error consists of the failure to instruct on an element of a crime in its entirety. When an instructional error affects a single element, the proper "object" of focus is the jury's verdict on that element. If, as here, the element-specific error, i.e., the instructional omission, prevents the jury from rendering a verdict on an element entirely, no "object" exists upon which harmless or plain error analysis can operate. To conclude the error was harmless or not plain would be the same as directing a verdict on the element – both would prevent an actual jury verdict on that element. Supreme Court precedent precludes us from "conduct[ing] a subjective inquiry into the juror's minds" in order to uphold a conviction.

Id. at ___, 1996 W.L. 707539 at *15, *quoting, Yates v. Evatt*, 500 U.S. 391, 404 (1991).

> Because the respective juries in the cases before us did not render a verdict, formal or otherwise, against Wiles or Schleibaum on the element of materiality, we hold that the district court's failure to instruct the juries as to the element of materiality under 18 U.S.C. §1001 on count one of the respective indictments is "structural" error and falls within that "special category of forfeited errors" that does not require a showing of prejudice, but rather, *must be* corrected. Because the error is structural, and thus not amenable to analysis under Fed.R.Cr.P. 52 or the discretion we possess thereunder, we vacate Defendants' §1001 convictions under count one of the respective indictments.

Wiles, ___ F.3d at ___, 1996 W.L. 707539 at *16, *citing Olano*, 507 U.S. at 735 (footnote omitted, emphasis in original).

In other words, an error such as that presented in this case is not amenable to analysis under Rule 52(a) or (b), which rules constitute the sole source of appellate discretion to affirm a conviction despite error that affects a defendant's substantial rights. The en banc Tenth Circuit specifically disagreed with decisions of other circuit panels that have concluded that a failure to instruct on an essential element is structural and presumed prejudicial, but then affirmed convictions under the discretionary prong of a plain error analysis because of the weight of the evidence. *Id.* at ___ n.13, 1996 W.L. 707539 at *16 n.13 (citations omitted).[9] "As we have seen, however, structural error requires reversal in every instance because such error 'undermines the structural integrity of the criminal tribunal itself.' " *Id.* at ___ n.13, 1996 W.L. 707539

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[9] *See also*, Edwards, *To Err is Human But Not Always Harmless: When Should Legal Error be Tolerated*, 70 N.Y. U.L.Rev. 1167 (December 1995). Chief Judge Edwards of the District of Columbia Circuit advocates considering whether error influenced the verdict and criticizes judges deciding cases based on their belief of whether an accused is actually guilty. "Just as *Sullivan* and *O'Neal* [*v. McAninch*, ___ U.S. ___, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)] do with the harmless-error doctrine, *Olano* requires that the plain error doctrine not be applied simply on the basis of the reviewing court's own assessment of the defendant's guilt." *Id.* at 1204. *See Weiler v. United States*, 323 U.S. 606, 611 (1945) ("We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.").

at *16 n.13, *quoting*, *Vasquez v. Hillery*, 474 U.S. 254, 263-264 (1986).

As in *Wiles*, the error in this case was structural and so requires reversal. Prejudice must be presumed. Moreover, actual prejudice to the petitioner can be shown because the trial judge directed a verdict of guilty to the jury on the materiality element.

Furthermore, the trial judge failed to hold the Government to a standard of guilt beyond a reasonable doubt and may have held the Government to no burden at all. The district court only found that the statements at issue "would be within the purview of information that the grand jury *may* have been looking at. . . . " Jt. App. 66 (emphasis added). *See e.g. United States v. Abroms*, 947 F.2d 1241, 1246-47 (5th Cir. 1991) ("[a]s a question of law, there cannot appropriately be *any* evidentiary or factual burden with respect to the issue of materiality") (internal quotations and citation omitted, emphasis in original); *United States v. Flowers*, 813 F.2d 1320, 1325 (4th Cir. 1987) ("government . . . bears a light burden in proving materiality"); *United States v. Giacalone*, 587 F.2d 5, 6-7 (6th Cir. 1978) (materiality need not be proven beyond reasonable doubt), *cert. denied*, 442 U.S. 940 (1979); *United States v. Martellano*, 675 F.2d 940, 942 (7th Cir. 1982) (same); *United States v. Martinez*, 837 F.2d 900, 902 (9th Cir. 1988) (same).

Clearly, the district court applied an unconstitutional standard, *In re Winship*, 397 U.S. at 375, even lower than a preponderance standard. That due process violation alone requires reversal as structural and actually prejudicial error. The petitioner has never been found guilty beyond a reasonable doubt on all elements of the charged offense. Accordingly, the judgment of the court of appeals should be reversed.

III.

REVERSAL IS COMPELLED EVEN IF PLAIN ERROR STANDARDS OF REVIEW APPLY.

The slippery slope of not permitting determination of all elements of the offense charged by the jury, even where trial counsel has acquiesced, is demonstrated by the instructive opinion in *United States v. Bosch*, 505 F.2d 78 (5th Cir. 1974), which applied Fed.R.Cr.P. 52(b). In *Bosch*, the jury's deliberations on a conspiracy count against the defendant were restricted to a single issue, whether the defendant's statements to government agents were made under immunity, and the jury was instructed to find the defendant guilty unless it found that the defendant had immunity. *Id.* at 79-81. Writing for the court of appeals and applying the Rule 52(b) standard later enunciated in *United States v. Olano*, 507 U.S. 725 (1993), Judge Clark expressed the issue as follows:

> In criminal trials, any encroachment upon the broad right to a jury's general verdict of guilty or not guilty is fraught with danger. In the bright light of appellate hindsight, we can see that what appeared below as an efficacious and unexceptional procedure masked instead the path to error. The special interrogatories which were used to narrow the issues for the jury may have required them to return a verdict of guilty even though they found that all elements of the offense had not been proved. This possibility requires reversal despite the express acquiescence of the court-appointed counsel for the defendant in the defective procedure.

* * *

Whether we think Bosch guilty or innocent is not a proper concern here – that is a jury's function. Indeed, more is at stake in the present appeal than just her substantial rights, though they must weigh heavily in the decisional equation.

In determining whether to notice these errors, a more important consideration is the over-all impact upon the system of criminal justice of allowing a conviction to flow from a jury's verdict which has been limited by judicially fashioned blinders to a single specified fact issue. This procedure is so fraught with danger for the defendant in particular and for the system in general that we review it here despite the fact that the attorney for the defendant did not comply with the salutatory commands of Federal Rules of Criminal Procedure 30. Not only because the errors affect substantial rights, but because they also squarely place the integrity of the judicial process at hazard, they must be reviewed.

* * *

The thrust of our decision today is that this sort of game is not worth the candle.

Id. at 78-79, 81-83 (citations and footnotes omitted).

As in *Bosch*, the petitioner's substantial rights to trial by jury under a standard of proof beyond a reasonable doubt and freedom from a directed verdict in a criminal case were affected structurally and prejudicially, and the gravity of the infringements "squarely place[s] the integrity of the judicial process at hazard." *Id.* at 82. Additionally, Bosch's conviction was reversed even though no post-trial change in the law was at issue, unlike in the

case now presented. Accordingly, the judgment of the court of appeals should be reversed.

This case presents circumstances not reached by the Court's decision in *United States v. Olano*, 507 U.S. 725 (1993). In *Olano*, the Court specifically noted, "There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.* at 735.

The issue presented in this case, the deprivation of the petitioner's right to a jury verdict on all essential elements of the offense charged, is so structural and fundamental that not only "can" it be corrected regardless of perceived effect on the outcome of the trial below, but it must be corrected. The structural and fundamental nature of the error presented further warrants a presumption of prejudice because the only way in which prejudice or the absence of prejudice possibly could be ascertained is through sheer speculation as to how the trial may have proceeded had the element of materiality been submitted to the jury and the parties permitted to frame their trial strategies accordingly.

The right to a complete verdict by the jury is as basic as the protections deemed too fundamental to be subject to any sort of harmlessness or prejudice inquiry, such as unlawful exclusion from a jury based on race, the right to self-representation at trial and the right to a public trial. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), *citing*, *Vasquez v. Hillery*, 474 U.S. 254 (1986); *McKaskle v. Wiggins*,

465 U.S. 168, 177-178 n.8 (1984); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984). "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-578 (1986) (citation omitted). Even if Fed.R.Cr.P. 52(b) has any application under the circumstances of this case, the deprivation of a citizen's right to trial by jury in a criminal case, "the grand bulwark of his liberties," 4 W. Blackstone, *Commentaries on the Law of England* 342 (1769), clearly constitutes an error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," warranting reversal. *Olano*, 507 U.S. at 732, *quoting*, *United States v. Atkinson*, 297 U.S. 157, 160 (1936). The Court has "*never* held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence." *Olano*, 507 U.S. at 736 (emphasis added). Accordingly, particularly with the gravity of the deprivation in this case, the petitioner should not be forced in some way to prove actual innocence for purposes of Rule 52(b) relief.[10]

Additionally, this case may present another issue specifically not reached in *Olano*: "[T]he special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." 507 U.S. at 734. Applicable law was not unclear, however, at the time of petitioner's trial; the law

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[10] The record contains no direct evidence that the petitioner's grand jury testimony was incorrect except as to a clearly immaterial discrepancy as to the year in which her benefactor, Mr. Talcott, died.

was clear that judges decided materiality. Indeed, error that would have been clear at the time of trial in this case in light of a half century of binding circuit precedent would have been submission of the element of materiality to the jury.

This question not reached in *Olano* is answered in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), which established that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." As a result, *Griffith* supplies the answer to the "special case" issue left unaddressed in *Olano*. *See United States v. Wiles*, ___ F.3d ___, 1996 W.L. 707539, *10 (10th Cir. Dec. 10, 1996) (en banc); *see also*, *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994) (burden under Rule 52(b) shifted to prosecution in light of intervening decision changing previously settled law), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995); *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir.) (supervening decision doctrine created to provide defendant the benefit of change in law), *cert. denied*, ___ U.S. ___, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994).

A contrary standard of review in circumstances of a clear change in law that overrules binding precedent at the time of trial would encourage frivolous objections.

> [W]hen faced with a "solid wall of circuit authority" endorsing a jury instruction, no objection to that instruction need be registered in the trial court to preserve the point on appeal should that "solid wall" suddenly crumble in the interim and render the instruction defective.

> An exception [to the instruction] would not have produced any results in the trial court. Under these circumstances were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on their settled principles out of hope that those principles will later be overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency.

United States v. Keys, 95 F.3d 874, 878 (9th Cir. 1996) (en banc), *quoting*, *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc). No distinction exists between a failure to object and the affirmative offering of a solidly settled model instruction by a defendant, *Keys*, 95 F.3d at 879, particularly where the pertinent law in the circuit has been settled for half a century.

Application of the strict Rule 52(b) standard in the circumstances of this case would communicate to defense counsel a clear message that counsel should not rely on settled principles of law and should object to every issue conceivable in case of a post-trial change in the law. *Id.* As the court further noted in *Keys*:

> Without a contemporaneous error, there was nothing to forfeit, to invite, or to waive. As the Second Circuit said in *United States v. Viola*, an attorney "cannot be said to have 'forfeited a right' by not making an objection, [because] at the time of trial no legal right existed."

Keys, 95 F.3d at 879, *quoting*, *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994); *see*, *United States v. Baumgardner*, 85

F.3d 1305, 1308-09 (8th Cir. 1996) (Rule 52(b) inapplicable where clear binding precedent overruled following trial because application of the Rule 52(b) standard would encourage frivolous objections).

The court has enumerated a series of inquiries that must be considered when applying Fed.R.Cr.P. 52(b). There must be (1) error that is (2) "plain" and the error must (3) "affect substantial rights." *United States v. Olano*, 507 U.S. 725, 731 (1993). Discretion to correct such an error should be exercised where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732.

That the issue presented in this petition constitutes error is beyond dispute. *See United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. ___, 132 L.Ed.2d 444 (1995). The petitioner is entitled to the benefit of *Gaudin*, which was rendered during the pendency of her direct appeal, for determination of the plainess or clarity of the error. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The error seriously affects the fairness, integrity and public reputation of judicial proceedings by constituting a deprivation of the petitioner's unqualified and unwaived right to trial by jury, by violating the constitutional prohibition against directed verdicts in criminal cases and by violating the due process principle that each element of a charged offense must be proven beyond a reasonable doubt.

The error further affected the outcome of the proceedings because no jury verdict has been reached on all the elements of the offense charged and because the jury's deliberative process clearly was contaminated by

the district court's instruction that, in effect, the defendant was guilty with respect to one element even prior to the commencement of deliberations. Without question, these deprivations of the petitioner's fundamental, core constitutional rights renders her trial unfair, results in a lack of integrity of the trial and brings the public reputation of judicial proceedings into doubt by subjecting to public question whether judicial anomaly can result in the greatest infringements of the most paramount rights secured for citizens by the Constitution. Accordingly, the judgment of the court of appeals should be reversed.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Date: December 30, 1996

No. 96-203

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOYCE B. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's perjury conviction should be reversed for plain error because the trial court resolved the issue of materiality itself rather than submitting it to the jury, when the trial took place before this Court disapproved of that practice in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), petitioner did not object to it in the district court, and there is no reasonable probability that any rational juror could have found petitioner's false testimony to have been immaterial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 84-88) is unpublished, but the judgment is noted at 82 F.3d 429 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1996. A petition for rehearing was denied on June 11, 1996. Pet. App. 10a-11a. The petition for a writ of certiorari was filed on August 5, 1996, and was granted on November 15, 1996 (117 S. Ct. 451). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rules of Criminal Procedure 30, 51, and 52 and 18 U.S.C. 1623 are set forth in the appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of perjury, in violation of 18 U.S.C. 1623. She was sentenced to 30 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay a fine of $30,000. J.A. 75-81. The court of appeals affirmed. J.A. 84-88.

1. Beginning in the 1980s, Earl James Fields and another man netted approximately $10 million from trafficking in illegal drugs. J.A. 85. In 1993, federal investigators and a federal grand jury sought evidence about the nature of Fields' drug distribution and money laundering activities. See J.A. 59-62.

Fields had been involved in a long-term relationship with petitioner and had fathered one of her children. See J.A. 39, 49-50. On March 25, 1993, petitioner was called before the grand jury to testify about whether, and to what extent, she had received money from Fields over the years and had invested it in various real estate holdings. Petitioner, a college graduate, testified that she was employed as a recruitment supervisor for the Florida Department of Health and Rehabilitative Services at an annual salary of approximately $34,000. J.A. 17-18, 85. She acknowledged having heard rumors that Fields was a drug dealer, but denied knowing that he was one. J.A. 47-48. She further acknowledged that she owned five real properties in Jacksonville, Florida, including her house on Moore Street. Petitioner had made extensive

improvements to that property, which increased its appraised value from $75,600 when petitioner bought it in 1991 to $344,800 in 1993. J.A. 85.

Much of petitioner's grand jury testimony focused on the source of her money for those improvements. She testified that she had paid for the improvements with $80,000 to $120,000 in cash that her mother had supposedly received from one Gerald Talcott. Petitioner identified Talcott as an acquaintance from Canada who befriended petitioner's family after her mother had found and returned his lost wallet. J.A. 22-23, 36. Petitioner said that, in 1985 or 1986, Talcott had given a box of money to her mother as a gift, and that her mother had stored that cash in her closet until her death in 1990. J.A. 22-28, 34. At that time, petitioner said, the money became hers. J.A. 27-28. Petitioner testified that she was unsure how much money was in the box, J.A. 25, that she never put the money into a bank but instead kept it in her closet, J.A. 34, and that she had used it all to pay for the improvements to her house, J.A. 36.

2. Petitioner's testimony about the source of funds for her home improvements formed the basis for her perjury indictment, J.A. 6-12, 85, which was issued by the same grand jury to which she had given that testimony. At trial, the prosecution established that Talcott had died in April 1982, several years before the time, according to petitioner (see J.A. 22, 25), that Talcott had given her mother between $80,000 and $120,000 in cash. In his will, Talcott had left nothing to petitioner or her mother; instead, he left $2,000 to a friend, a blacksmith's anvil to another friend, a lawn swing to his cousin, and the remainder of his estate to six designated charitable organizations. 1 Tr. 251, 255-256; Gov't Exh. 5. Moreover, petitioner's sister

testified that she had lived next door to their mother until her death, had seen her daily, and yet knew nothing about the putative cash hoard. 2 Tr. 9-11.

3. At the close of trial, petitioner and the prosecution each proposed the standard Eleventh Circuit pattern jury instruction on materiality, an element of perjury under 18 U.S.C. 1623(a).[1] J.A. 67-70; see generally *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) ("[A] concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed.") (internal quotation marks omitted). The district court agreed to that joint request and gave the following instruction:

> The materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned, but, rather, it is a question for the Court to decide. You are instructed that the questions asked the defendant, as alleged, constituted material matters in the grand jury proceedings referred to in the indictment.

J.A. 72. Petitioner did not object to that instruction. 3 Tr. 137. Nor did she ever seek a jury determination on the materiality issue. In fact, when the government had elicited trial testimony from the grand jury foreman on the nature of the grand jury's investigation, petitioner's counsel had unsuccessfully objected: "Your honor, this is an improper matter for the jury. It goes to materiality and that's a matter for the Court, and I object." J.A. 61.

[1] Section 1623(a) of Title 18 provides in pertinent part:

> Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined under this title or imprisoned not more than five years, or both.

After receiving the parties' proposed instructions, but before instructing the jury (see J.A. 2-3, 63), the district court conducted a hearing on, among other issues, the materiality of petitioner's testimony about her source of money for the home improvements. See J.A. 65-66. At the hearing, petitioner's counsel confined his discussion of that issue to a single sentence: "I would argue that the element of materiality has been insufficiently proven and that the Court ought to grant a judgment of acquittal." 2A Tr. 109. Petitioner presented no argument or evidence to support that assertion.

On reviewing the record, the district court determined that petitioner's testimony had been material to the grand jury's inquiry. See J.A. 65-66. The court based that determination on unchallenged evidence that the grand jury had been investigating the "alleged distribution of cocaine and marijuana by Mr. Fields and the disposition of the money which was the proceeds of that business, including the possible concealment of the proceeds as investments in real estate." *Ibid.*; accord J.A. 5-6 (indictment of Johnson, issued by same grand jury that had been investigating Fields); J.A. 59-60 (testimony of federal agent assigned to Fields investigation), 60-62 (testimony of grand jury foreman). The district court concluded that the subject of the relevant portion of petitioner's testimony—the source of her money to "purchase the home or to reconstruct the home"—therefore "would be within the purview of information that the grand jury may have been looking at in order to continue

their investigation or conduct their investigation on Mr. Fields." J.A. 66.

On December 9, 1994, the jury found petitioner guilty of perjury. In reaching that verdict, the jury found beyond a reasonable doubt that petitioner had "knowingly" and "willfully" given "false testimony" to the grand jury while "under oath." J.A. 72-74 (jury instructions).

4. After petitioner's conviction, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Fifth and Sixth Amendments require the submission of the materiality issue to the jury when materiality is an element of a charged offense. On appeal, petitioner contended that her conviction should be reversed because the district court had decided the materiality question itself. The court of appeals agreed with petitioner that, under *Gaudin*, the district court had committed error. J.A. 86-87. Because petitioner had not objected to that error at trial, however, the court of appeals (see J.A. 87) reviewed the court's action for plain error under Federal Rule of Criminal Procedure 52(b), which states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In conducting that review, the court of appeals assumed, without deciding, that the district court's error had been "plain" within the meaning of Rule 52(b). J.A. 87; see generally *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The court held, however, that the error had not affected petitioner's "substantial rights," and therefore did not require reversal under Rule 52(b), in light of the "overwhelming evidence"

that her false claims were material. The court explained:

> The focus of the grand jury's investigation was the whereabouts of the proceeds from Fields' drug trafficking activities. There was substantial evidence that [petitioner], and specifically her house, was one of the avenues through which Fields laundered that money. No reasonable juror could conclude that [petitioner's] false statements about the source of the money used to purchase and renovate her house were not material to the grand jury's investigation.

J.A. 88.

SUMMARY OF ARGUMENT

I. In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), which was decided after the trial in this case, this Court made clear that it is error for a district court to decide the element of materiality itself instead of submitting it to the jury. Nonetheless, "[n]o procedural principle is more familiar to this Court than that a constitutional right * * * may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Here, petitioner forfeited her *Gaudin* claim by failing to raise it at trial. See Fed. R. Crim. P. 30, 51. The only provision for appellate review of that claim is therefore Rule 52(b) of the Federal Rules of Criminal Procedure, which prescribes the "plain error" inquiry that governs this case. Petitioner's contrary argument—which would exempt defendants from the need to satisfy the Rule 52(b) standard in cases where a "solid

wall" of precedent would have defeated an objection at trial or where an error is deemed "structural"—is inconsistent with the text and purposes of the Federal Rules.

II. Application of Rule 52(b) in this case requires affirmance of petitioner's conviction for two independent reasons. First, by its terms, that provision entitles a defendant to relief only when the error in question was "plain" at the time of both trial and appeal. "[R]ecourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). The disposition of the materiality issue by the court rather than the jury, which was accepted practice in 11 of the 12 regional courts of appeals at the time of trial, does not meet that threshold requirement.

Second, even if relief were sometimes available in cases where a forfeited error becomes "plain" only at the time of appeal, the *Gaudin* error in this case would not warrant the exercise of appellate remedial discretion. As an initial matter, *Gaudin* error is not "structural" error, but trial error that is subject to case-by-case review to determine whether it affected "substantial rights." But even if the *Gaudin* error in this case could be said to have affected petitioner's "substantial rights" despite the overwhelming evidence against her on the materiality issue, reversal of her conviction is appropriate only if the error also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

The error in this case has no such effect. There is no reasonable probability that a trial free from *Gaudin* error would have led to a different result; the error, in other words, does not "undermine[] confidence in the outcome of the trial." Cf. *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1565-1566 (1995). And there is nothing about the character of the error itself that justifies reversal in the absence of a showing that the error might have affected the outcome of a given case. For more than five decades, courts adhered almost universally to the approach followed by the district court in this case, resulting in thousands of perjury convictions in which the issue of materiality was resolved by the court. A practice that widespread and that rarely questioned is not so unfair that affirmance of such convictions would threaten the reputation of the courts. Indeed, to reverse a conviction based on an error that was not identified as such until after trial, and that had no reasonable probability of affecting the result in a particular case, would itself undermine "the fairness, integrity [and] public reputation" of the criminal justice system. See *Olano*, 507 U.S. at 736.

ARGUMENT

I. RULE 52(b) PRESCRIBES THE EXCLUSIVE STANDARD FOR REVIEWING ERRORS TO WHICH A DEFENDANT DID NOT OBJECT AT TRIAL

1. In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), this Court held that the issue of materiality, like other elements of a criminal offense, must be submitted to a jury in a prosecution brought under 18 U.S.C. 1001, which prohibits false statements in a matter within the jurisdiction of a federal agency.

That holding also governs prosecutions brought under 18 U.S.C. 1623(a), the federal perjury statute at issue here. Under both Section 1001 and Section 1623(a), the materiality element typically presents a "mixed question of law and fact," a form of inquiry that this Court has deemed "peculiarly on[e] for the trier of fact." *Gaudin*, 115 S. Ct. at 2314-2315.[2] We therefore agree with petitioner that the district court erred in deciding the materiality question itself rather than submitting it to the jury.

The issue presented in this case is not, however, whether the district court erred, but whether that error requires the reversal of petitioner's conviction even though she did not preserve her objection to that error at trial.[3] "'No procedural principle is more

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[2] In contrast, some criminal statutes present materiality questions that must be resolved purely as a matter of logic or statutory definition. See, *e.g.*, *United States* v. *Klais*, 68 F.3d 1282 (11th Cir. 1995) (prosecution for false statements "with respect to any fact material to the lawfulness of [a firearm] sale," 18 U.S.C. 922(a)(6)), cert. denied, 117 S. Ct. 94 (1996); *United States* v. *Klausner*, 80 F.3d 55, 61 (2d Cir. 1996) (prosecution for preparing a tax return that is false as to a material matter under 26 U.S.C. 7206(2)). This case does not present any issue concerning whether it would be error for a district court to decide such questions as a matter of law. Compare *Klausner*, 80 F.3d at 61 (finding no error), with *United States* v. *DiRico*, 78 F.3d 732, 736 (1st Cir. 1996) (finding error).

[3] Petitioner's counsel not only requested the very instruction that informed the jury that the materiality question had been decided against petitioner, see J.A. 69-70, but objected to the presentation of any materiality evidence to the jury on the ground that materiality was "a matter for the Court" and "an improper matter for the jury," J.A. 61. Petitioner's claim might therefore be barred by the doctrine that a defendant who "invites" an error at trial may not then cite that error as a basis for reversal. See *United States* v. *Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989). The court of appeals, however, did not reach that issue. J.A. 86 n.1. Moreover, because petitioner's *Gaudin* claim fails under plain-error analysis and because the government did not previously argue that petitioner "waived" her right to a jury determination of the materiality issue, this Court should resolve the case on the premise that petitioner merely "forfeited," rather than "waived," her right to a jury trial on that issue. See *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (explaining that "waiver," as opposed to forfeiture, extinguishes a claim of "error").

familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); see also *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); cf. *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 363 (1963) (rejecting forfeited claim of grand jury discrimination in absence of timely objection at trial). Here, because petitioner did not object to the *Gaudin* error at trial, the only source for appellate review of her *Gaudin* claim is Federal Rule of Criminal Procedure 52(b), which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See *Olano*, 507 U.S. at 732-737 (describing "plain error" inquiry).

Citing recent Ninth Circuit precedent, petitioner suggests that Rule 52(b) is inapplicable, and that the more lenient "harmless error" standards of Rule 52(a) should govern instead, where a "'solid wall' of

binding authority" would have made any objection futile at the time of trial. Pet. Br. 25 (quoting *United States* v. *Keys*, 95 F.3d 874, 879 (9th Cir. 1996) (en banc), petition for cert. pending, No. 96-1089 (filed Jan. 9, 1997)). That position is inconsistent with the text and underlying purposes of the Federal Rules of Criminal Procedure.[4]

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[4] The great majority of courts of appeals that have addressed *Gaudin*-type challenges to convictions have determined that plain-error review under Rule 52(b) is the appropriate standard for reviewing a *Gaudin* claim when the defendant did not object at trial to the district court's failure to submit the element of materiality to the jury. See, *e.g.*, *United States* v. *Jobe*, 101 F.3d 1046, 1061-1062 (5th Cir. 1996); *United States* v. *McGhee*, 87 F.3d 184, 186, vacated and rehearing en banc granted, 95 F.3d 1335 (6th Cir. 1996); *United States* v. *Baumgardner*, 85 F.3d 1305, 1308 (8th Cir. 1996); *United States* v. *David*, 83 F.3d 638, 641 (4th Cir. 1996); *United States* v. *Randazzo*, 80 F.3d 623, 631 & n.4 (1st Cir. 1996); *United States* v. *Ross*, 77 F.3d 1525, 1540-1541 (7th Cir. 1996); *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir.), cert. denied, 117 S. Ct. 516 (1996); see also *United States* v. *Retos*, 25 F.3d 1220, 1228 (3d Cir. 1994); *United States* v. *Jones*, 21 F.3d 165, 172-173 (7th Cir. 1994); cf. *United States* v. *Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996) (Rule 52(b) is sole source of appellate jurisdiction, but burden shifts to government to show that defendant's substantial rights were not affected by error). Only the Ninth and Tenth Circuits have deemed plain-error analysis inapplicable in those circumstances. See *United States* v. *Wiles*, Nos. 94-1592 & 95-1022, 1996 WL 707539, at *16 (10th Cir. Dec. 10, 1996) (to be reported at 102 F.3d 1043) (*Gaudin* errors are "structural" and "not amenable to analysis under Fed.R.Crim.P. 52"); *United States* v. *Keys*, 95 F.3d 874, 879 (9th Cir. 1996) (en banc) ("[W]e review under these special circumstances not for plain error, but only for error under Rule 52(a)."), petition for cert. pending, No. 96-1089 (filed Jan. 9, 1997); cf. *United States* v. *Washington*, 12 F.3d 1128, 1138-1139 (D.C. Cir.) (adopting "supervening decision" doctrine, permitting review outside

Those Rules impose both a specific and a general contemporaneous-objection requirement on any defendant who seeks to preserve a challenge to the district court's submission of a case to the jury. Rule 30 provides that "[n]o party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict." Rule 51 provides, more generally, that, to preserve an objection, a party must "make[] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor." By disregarding those procedural requirements, petitioner forfeited her *Gaudin* claim. See *Olano*, 507 U.S. at 731. And only one provision of federal law entitles petitioner to seek appellate relief despite that forfeiture: Rule 52(b), which specifically governs "errors that were forfeited because not timely raised in district court." *Olano*, 507 U.S. at 731. The "harmless error" standard of Rule 52(a) is unavailable because, as this Court has observed, that provision "governs nonforfeited errors." *Ibid.* Federal courts, moreover, have no residual "supervisory power" to fashion "rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle* v. *United States*, 116 S. Ct. 1460, 1466 (1996); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) (courts may not circumvent harmless-error inquiry required by Rule 52(a)). Courts therefore have no source of authority to "disregard the

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confines of Rule 52(b) where law was settled at time of trial (such that objection would have been futile) but change in governing law occurred by time of appeal), cert. denied, 115 S. Ct. 98 (1994).

Rule[s'] mandate," *id.* at 255, by reviewing forfeited error outside the framework of Rule 52(b).

2. Quite apart from that textual mandate, the purposes underlying the contemporaneous-objection requirement support the same conclusion. As this Court has explained, "[a]ny unwarranted extension" of Rule 52(b)'s narrowly tailored provision for appellate review of forfeited errors "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *Frady*, 456 U.S. at 163); see also *Levine* v. *United States*, 362 U.S. 610, 619-620 (1960) ("Due regard" for a defendant's constitutional rights "does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal."); *Socony-Vacuum*, 310 U.S. at 238-289. Even where circuit precedent arguably compels a trial procedure that other circuits have found unconstitutional, see Pet. Br. 6-7, consistent adherence to the contemporaneous-objection rule remains necessary to ensure the integrity of the trial process. A timely objection is necessary to give the district court an opportunity, in the first instance, to consider the continued validity of existing circuit law and its applicability to the facts of a given case. Moreover, with respect to some categories of error, a timely objection is also necessary to alert the court to any need to supplement the record to accommodate a potential change in controlling law on appeal.

Petitioner's proposed exception to the textually mandated scope of Rule 52(b)—for cases presenting a "solid wall" of unfavorable authority (see Pet. Br. 25)—would mire the courts of appeals in indeterminate inquiries into the "solid[ity]" of the legal precedent that, at the time of trial, supposedly foreclosed a defendant's claim. This case is itself an example of that indeterminacy. Nearly six months before petitioner's trial, the en banc Ninth Circuit recognized the very *Gaudin* right, for prosecutions brought under 18 U.S.C. 1001, that petitioner asserts here. See *United States* v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), aff'd, 115 S. Ct. 2310 (1995). The foundation for that holding was this Court's decision in *In re Winship*, 397 U.S. 358 (1970), as applied in cases through *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Petitioner does not explain why she could not have raised at trial a legal claim that was then the subject of a circuit split and a pending petition for a writ of certiorari that the United States had filed in this Court.[5]

Petitioner further argues (see Br. 37-39) that uniform application of the contemporaneous-objection requirement would prolong trials by giving defense lawyers an incentive to make frivolous legal objections that they would not otherwise make. That concern, for which petitioner offers no empirical support, is without substance. The class of legal claims

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[5] Petitioner suggests (Br. 28) that Rule 51 exempts her from the contemporaneous-objection requirement because she had "no opportunity" to object to the *Gaudin* error in this case. See Fed. R. Crim. P. 51 ("[I]f a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party."). That is incorrect. Petitioner had every opportunity to ask the district court to submit the materiality issue to the jury; she simply elected not to do so.

at issue—claims that are contrary to precedent at the time of trial but that might plausibly benefit from a change in law by the time of appeal—is quite small, and the time required to assert such claims at trial is inconsequential. In this case, for example, if petitioner had seen any potential value in having the jury consider materiality, she could have alerted the district court to her *Gaudin* claim in a matter of seconds. Of course, if petitioner is correct, and if consistent enforcement of the contemporaneous-objection rule does lead to excessive, frivolous objections, the appropriate course is to amend the Federal Rules of Criminal Procedure, not to carve out ad hoc exceptions to those Rules as they are now written.

3. Petitioner also suggests (Br. 19, 31) that her *Gaudin* claim is "structural," such that it falls entirely outside the confines of Rule 52 and requires reversal in every case in which it occurs. That is incorrect. Even if *Gaudin* error belonged to the small class of errors that this Court has described as "structural," which it does not, see pp. 26-29, *infra*, structural errors are not exempt from analysis under Rule 52(b). See *Waldemer* v. *United States*, No. 96-1119 (7th Cir. Jan. 16, 1997) (order amending prior opinion at 98 F.3d 306) (characterizing *Gaudin* error as "structural," but reaffirming its authority to "use[] the discretion afforded us on plain error review to affirm the conviction"); see also *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) ("The mix of considerations is very different where the trial judge has not been alerted by an objection. Indeed, the [materiality] element may be one that the defendant has chosen not to contest."), cert. denied, 116 S. Ct. 2529 (1996), cert. dismissed, 117 S. Ct. 38 (1996).

A "structural" error is distinguished by the absence of any need to inquire into the possibility of harmlessness when a properly preserved claim of such error is raised on appeal. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984). This Court has never held, however, that claims of structural error are immune from generally applicable rules of procedural default. To the contrary, the Court has relied on a defendant's non-compliance with the contemporaneous-objection requirement as the basis for denying appellate relief in a context where, if the defendant had made a timely objection, the error would have required automatic reversal. Compare *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986) (claim of racial discrimination in the selection of the grand jury can never be harmless error), with *Davis* v. *United States*, 411 U.S. 233, 241-242 (1973) (under Fed. R. Crim. P. 12(b)(2), such a claim is generally barred if not properly raised at trial). Here, Rule 52(b) prescribes the exclusive source of appellate authority for reviewing claims of forfeited error. As the Court explained in *Olano*, that Rule, which "governs on appeal from criminal proceedings, provides a court of appeals a *limited* power to correct errors that were forfeited because not timely raised in district court." 507 U.S. at 731 (emphasis added). Courts and criminal defendants may not short-circuit the limitations of Rule 52(b) by characterizing an error as "structural." Cf. *Carlisle*, 116 S. Ct. at 1466.

II. THE *GAUDIN* ERROR AT PETITIONER'S TRIAL DOES NOT WARRANT REVERSAL UNDER RULE 52(b)

As this Court explained in *Olano*, the plain-error rule entitles a defendant to relief only if the defendant can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," "clear," or "obvious" and (3) that affected his "substantial rights." *Olano*, 507 U.S. at 732-735. Even when those showings are made, however, "Rule 52(b) is permissive, not mandatory." *Id.* at 735. A reviewing court may exercise its "discretion" to reverse a conviction for plain error only "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)); see also *Young*, 470 U.S. at 15 (reversal warranted under plain-error rule "in those circumstances in which a miscarriage of justice would otherwise result") (quoting *Frady*, 456 U.S. at 163 n.14). Petitioner's *Gaudin* claim does not satisfy those standards because it was not "plain" within the meaning of Rule 52(b) and, in any event, because it did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."

A. The *Gaudin* Error At Petitioner's Trial Was Not "Plain" Within The Meaning Of Rule 52(b)

1. In identifying the errors that are "plain" ("or, equivalently, 'obvious'") for purposes of Rule 52(b), this Court has not addressed "the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Olano*, 507 U.S. at 734. In one key respect,

this case resembles that "special case": the law governing disposition of the materiality element in perjury trials was "clarified" (by *Gaudin*) during the pendency of petitioner's appeal. In contrast, at the time of petitioner's trial, the governing circuit law was not "unclear": it straightforwardly treated materiality as a matter for the district court, rather than the jury, to decide. See *United States* v. *Molinares*, 700 F.2d 647, 653 (11th Cir. 1983) (materiality under 18 U.S.C. 1623 is a question of law); *United States* v. *Damato*, 554 F.2d 1371, 1373 (5th Cir. 1977) ("The trial court should embody its finding on materiality in an instruction to the jury."). Thus, although that approach was already contrary to the law of another circuit, see *United States* v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), aff'd, 115 S. Ct. 2310 (1995), it did not have the character of error at all in the Eleventh Circuit, let alone "plain" error, until this Court decided *Gaudin*.

In those circumstances, reversing a defendant's conviction in the absence of a contemporaneous objection would be inconsistent with the language and purposes of Rule 52(b). That Rule provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). By its terms, Rule 52(b) therefore specifies two different times at which a "plain error" might be identified: first, at trial, where the error could have been (but was not) "brought to the attention of the court," and, second, on appeal, where the error might nonetheless be "noticed." In each case, the subject that is either "brought to the [court's] attention" (at the time of trial) or "noticed" (at the time of appeal) is identical: it is "plain error." Put another way, an error cannot

be "noticed" under Rule 52(b) unless it had the same character at trial that it has on appeal: it must have been as "plain" then as now.

Petitioner's contrary interpretation would permit reversal where what should have been "brought to the attention of the [district] court" was not "plain error" at all, as Rule 52(b) requires, but debatable error. That kind of error, however, does not warrant reversal in the absence of a timely objection. See Fed. R. Crim. P. 52(a); cf. *Gaudin*, 115 S. Ct. at 2322 (Rehnquist, C.J., concurring) ("it is certainly subject to dispute whether the error in this case was 'clear under current law,'" a precondition to relief under Rule 52(b)) (quoting *Olano*, 507 U.S. at 734).

For another reason as well, the text of Rule 52(b) requires limiting plain-error relief to errors that are plain at the time of both trial and appeal. The need to enforce the contemporaneous-objection rule is at its zenith in the "special case" identified in *Olano*: where the governing law is simply unclear at the time of trial. See 507 U.S. at 734. In that circumstance, because a district court has an exceptional interest in addressing unclear issues of law in the first instance, the "special case" is the most obvious circumstance in which a defendant's failure to alert the district court to his legal claim should foreclose relief under Rule 52(b). See *United States* v. *Turman*, No. 94-50305, 1997 WL 14791, at *4 (9th Cir. Jan. 17, 1997) ("[A]n error is not plain unless it would have been obvious to a reasonably competent district judge at the time of trial."); *United States* v. *David*, 83 F.3d 638, 643 (4th Cir. 1996) ("[A]s we understand the special case, it is precisely the circumstance where it is most obvious that review should not be authorized.").

Petitioner's position would require the courts of appeals to draw an amorphous distinction between the "special case" and the other class of cases in which an error becomes "plain" only on appeal: cases, such as this one, in which the district court action later challenged as error was, at the time of trial, compelled (rather than merely suggested or allowed) by circuit precedent. See *Turman*, 1997 WL 14791, at *2-*4 (appellate review is unavailable in "special case" but available where objection would have confronted a "solid wall" of contrary circuit authority); *David*, 83 F.3d at 644-646 (similar). But nothing in the text of Rule 52(b) contemplates or permits any such distinction: an error is either "plain" (because it is clearly barred by controlling law) or it is not. It is more faithful to the text of Rule 52(b), and simpler for the courts of appeals, to obviate that distinction altogether by treating alike all cases in which an error was not "plain" at the time of trial.[6]

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[6] The Ninth Circuit held in *Keys* that it would review *Gaudin* claims not raised at trial for harmless error under Rule 52(a) rather than for plain error under Rule 52(b). The court reasoned that the failure to object was excused because, "[s]ince 1970, we have advised criminal defense counsel in this circuit that when faced with a 'solid wall of circuit authority' endorsing a jury instruction, no objection to that instruction need be registered in the trial court to preserve the point on appeal should that 'solid wall' suddenly crumble in the interim and render the instruction defective." 95 F.3d at 878. The Ninth Circuit, however, has no power to advise defense counsel to disregard the contemporaneous-objection requirement of Federal Rules of Criminal Procedure 30 and 51. See *Carlisle*, 116 S. Ct. at 1466. In any event, the Ninth Circuit's approach would not help petitioner, who can point to no similar doctrine in the Eleventh Circuit.

2. Quite apart from those textual considerations, confining the remedial scope of Rule 52(b) to errors that were plain at the time of trial comports with the narrowly defined purposes of the Rule. In *United States* v. *Frady*, 456 U.S. 152 (1982), this Court observed, in dictum, that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Id.* at 163. That approach, which by definition forecloses application of plain-error relief where an error becomes "plain" only at the time of appeal, makes abundant sense. Rule 52(b) is designed to protect defendants only against "particularly egregious errors." *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163); see also *Wiborg* v. *United States*, 163 U.S. 632, 658 (1896). At this stage in the development of American law, that characterization does not readily describe trial procedures, such as the one at issue here, that are endorsed by a majority of federal circuits at the time of a defendant's trial. See *Gaudin*, 28 F.3d at 955 (Kozinski, J., dissenting) (citing pre-*Gaudin* cases holding that materiality is an issue of law for the trial judge). And that characterization is an especially inapt description of a practice that traces its roots to a decision of this Court that had endured for more than 60 years by the time of trial. See *Sinclair* v. *United States*, 279 U.S. 263 (1929) (holding that a question's "pertinen[cy]" to a matter under congressional inquiry, 2 U.S.C. 192, was an issue of law for the court), overruled by *Gaudin*, 115 S. Ct. at 2318-2319.

There is nothing unfair about limiting the remedial scope of Rule 52(b) to errors that were plain at the time of trial. If petitioner's trial had taken place one

year earlier, and if her conviction had become final before this Court decided *Gaudin*, she would almost certainly have been barred from invoking the new constitutional rule announced in *Gaudin* as a basis for collateral relief. See *Teague* v. *Lane*, 489 U.S. 288 (1989) (a "new rule" may not generally be asserted on collateral review); *Butler* v. *McKellar*, 494 U.S. 407, 412 (1990) (a holding that overrules a precedent of this Court is "obviously" a new rule under *Teague*).[7] Under *Teague*, innumerable petitioners for post-conviction relief whose perjury convictions became final before *Gaudin* will not benefit from *Gaudin*'s

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[7] *Teague* does not bar the assertion of a new rule that "places a class of private conduct beyond the power of the State to proscribe," or that constitutes a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Gray* v. *Netherland*, 116 S. Ct. 2074, 2084 (1996) (internal quotation marks omitted); *Teague*, 489 U.S. at 311 (plurality opinion). The rule announced in *Gaudin*, however, does not qualify for either exception. *Gaudin* did not place any private conduct beyond the government's reach. Nor did its reevaluation of whether judge or jury should determine materiality meet the two-part test for "watershed" new rules, under which the rule must not only significantly improve the "accuracy" of the trial, but also "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990) (internal quotation marks and emphasis omitted). The benchmark for any such "watershed" rule is the right to counsel in felony cases. See *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990) ("[W]e have usually cited *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception."). As the plurality in *Teague* observed, it is "unlikely that many such components of basic due process have yet to emerge." 489 U.S. at 313.

new constitutional rule. Petitioner has no special claim to more favorable treatment.

Petitioner contends (Pet. Br. 25-26), that the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), bars the application of plain-error review under Rule 52(b) in this case. That is incorrect. *Griffith* holds that a ruling of this Court applies to all criminal cases that are not final at the time the ruling is announced, whether or not the decision makes a "clear break" with prior law. *Id.* at 328. Accordingly, *Griffith* entitles petitioner to rely on *Gaudin* (which was decided before petitioner's conviction became final) in arguing that withholding the materiality determination from the jury constituted "error." Nothing in *Griffith*, however, suggests that a defendant who has *forfeited* a constitutional claim is excused, once favorable new precedent appears, from satisfying the remaining three components of the plain-error test. See *Olano*, 507 U.S. at 731. The petitioners in *Griffith* had each objected at trial on the same fundamental grounds that they later cited on appeal, with the aid of favorable intervening Supreme Court precedent, as a basis for reversal. See 479 U.S. at 317, 319. By permitting the defendants in *Griffith* to rely on the intervening case won by another defendant, *Griffith* served the goal of "treating similarly situated defendants the same." *Id.* at 327. A defendant who objects at trial, however, is not "similarly situated" in all respects to a defendant, such as petitioner, who did not. Plain-error review applies to the latter class of defendants because the judicial system has a strong interest in "encourag[ing] all trial participants to seek a fair and accurate trial the first time around." *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163).

B. The *Gaudin* Error At Petitioner's Trial Does Not Satisfy The Requirements For Discretionary Relief Under Rule 52(b)

Even if Rule 52(b) could be construed to permit appellate relief in some cases when an error becomes plain only after the time of trial, the Rule requires two additional showings before a court may reverse a conviction. Not only must petitioner show that the error affected her "substantial rights," but also, under the "discretionary" component of the plain-error inquiry, the error must "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. In this case, it is unnecessary to decide whether the *Gaudin* error affected petitioner's substantial rights. Even if it did, relief would be clearly unwarranted under the discretionary prong of Rule 52(b). Petitioner does not and cannot demonstrate any reasonable probability that a trial without the *Gaudin* error would result in a different outcome. And the error at issue—which conformed to nearly universal practice at the time of trial and which enjoyed the approval of courts throughout the nation, including the highest court in the land—does not independently require relief despite its unimportance to the outcome. To grant relief in this case would therefore detract from, rather than enhance, "the fairness, integrity [and] public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

1. Petitioner focuses much of her argument on the "substantial rights" component of the plain-error inquiry.[8] In so doing, she articulates no basis for con-

[8] The inquiry into whether an error affects "substantial rights" is common to both the harmless-error and plain-error

testing the district court's materiality determination and no reason for believing that a properly instructed jury would have reached a different determination. Instead, she argues that the error here is "structural," and that structural errors automatically violate a defendant's "substantial rights" whether or not they cause demonstrable prejudice. See, *e.g.*, Pet. Br. 21-22, 35-36. Even if petitioner were correct in classifying *Gaudin* error as "structural," it would not assist her here; a reviewing court must still address the scope of its "remedial discretion" under *Olano*, 507 U.S. at 736, and petitioner's claim does not satisfy the standards governing the exercise of that discretion. But petitioner is in any event incorrect in labeling *Gaudin* error as "structural."

This Court has emphasized that, in any criminal prosecution, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). Accordingly, the Court has found that "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 307 (1991). In *Fulminante*, this Court distinguished "structural defects in the constitution of the trial mechanism," which generally affect both "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds,"

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rules. See Fed. R. Crim. P. 52(a) ("Any error * * * which does not affect substantial rights shall be disregarded."). The plain-error rule, Rule 52(b), "normally requires the same kind of [substantial rights] inquiry [as Rule 52(a)], with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734.

from "error[s] in the trial process itself." *Id.* at 309-310. Structural error is characterized by an overarching defect that forecloses harmless-error review. This Court has recognized only a handful of errors as structural. See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (total denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge). "Trial errors," in contrast, are amenable to harmless-error review. *Fulminante*, 499 U.S. at 306-308 (collecting cases).

The Court has held that many errors in jury instructions involving a single element of an offense are trial errors, subject to harmless-error analysis. See *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991) (erroneous rebuttable presumption); *Rose* v. *Clark*, 478 U.S. at 580 (same); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) (unconstitutional misdescription of element of offense). For example, where a jury is erroneously instructed to presume an ultimate fact from predicate facts, the error is nonetheless harmless if "no rational jury could find those [predicate] facts without also finding that ultimate fact," because, in that context, "making those findings is functionally equivalent to finding the element required to be presumed." *Sullivan*, 508 U.S. at 281; *Carella*, 491 U.S. at 266. That determination may be made when an element has been entirely omitted, just as it may be made when the element has been misdescribed. See *California* v. *Roy*, 117 S. Ct.

337, 339 (1996) (per curiam) ("[A]n error in the instruction that defined the crime * * * is * * * as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'"). In either case, such an error is, by definition, not "of the structural sort that def[ies] analysis by harmless error standards." *Ibid.* (internal quotation marks omitted).

For that reason, *Gaudin* error is not properly characterized as "structural." A *Gaudin* error removes only one element (materiality) from the jury's consideration; the jury must otherwise consider the evidence and determine, beyond a reasonable doubt, whether the defendant "knowingly" made a "false" statement under "oath." 18 U.S.C. 1623(a). Thus, a *Gaudin* error would be deemed harmless when a jury's findings on the other elements of an offense embrace facts that no rational juror could have found without finding the functional equivalent of materiality. See *United States* v. *McGhee*, 87 F.3d 184, 187-188 (noting that, in light of "predicate facts" that jury had to find to infer knowing false statements, *Gaudin* error was harmless under *Rose* v. *Clark*, *supra*), vacated and rehearing en banc granted, 95 F.3d 1335 (6th Cir. 1996). *Gaudin* error might also be harmless where, at trial, a defendant conceded the materiality of his statements. See *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment); cf. *United States* v. *Rogers*, 94 F.3d 1519, 1526-1527 (11th Cir. 1996) (omission of knowledge element in prosecution under 26 U.S.C. 5861(i) harmless when defendant admitted knowledge). And the error would be harmless if the jury found the element in question in returning a verdict on a different but factually related count. Accordingly, as Amicus National Association

of Criminal Defense Lawyers (NACDL) recognizes, because errors in the category to which *Gaudin* error belongs "can be harmless in one of these special circumstances, it would not be appropriate to classify the broad category of [such] errors as 'structural' errors." NACDL Br. 22.[9]

Because petitioner's characterization of *Gaudin* error as "structural" is incorrect, she must demonstrate actual prejudice to establish that the *Gaudin* error at her trial affected her "substantial rights." The court of appeals held that she could not make that showing because the evidence of materiality was "overwhelming." J.A. 88. This Court need not decide whether overwhelming evidence of materiality may demonstrate that a *Gaudin* error did not affect a defendant's "substantial rights,"[10] however, because

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[9] The NACDL argues (Br. 22) that it would be appropriate to label the subcategory of such errors that *are* harmful as "structural." The term "structural error," however, defines a class of errors to which harmless-error analysis is inapplicable. See *California* v. *Roy*, 117 S. Ct. at 339; *Sullivan*, 508 U.S. at 281-282. That phrase does not apply to errors that a reviewing court deems harmful after conducting harmless-error analysis.

[10] Compare *Pope* v. *Illinois*, 481 U.S. at 503 ("[I]f a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand."), with, *e.g.*, *Sullivan*, 508 U.S. at 280 (erroneous "reasonable doubt" instruction invalidates conviction on harmless-error review where "[t]he most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt"); *Yates* v. *Evatt*, 500 U.S. at 404 ("[T]he issue under *Chapman* [v. *California*, 386 U.S. 18 (1967)] is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt."); *California* v. *Roy*, 117 S. Ct. at 339 (Scalia, J., joined by Ginsburg, J., concurring) ("The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the

that issue is ultimately irrelevant to the outcome of this case.

By its terms, "Rule 52(b) is permissive, not mandatory," and "the standard that should guide the exercise of remedial discretion under Rule 52(b)" is whether an error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 735-736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). As this Court made clear in *Olano*, "a plain error affecting substantial rights does not, without more, satisfy [that] standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." 507 U.S. at 737. As discussed below, whether or not the *Gaudin* error here affected petitioner's "substantial rights," concern for "the fairness, integrity [and] public reputation of judicial proceedings" requires affirmance, not reversal, of her conviction.[11]

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evidence, no reasonable jury would have found otherwise."). Cf. *Olano*, 507 U.S. at 734 (on plain-error review, but not on harmless-error review, defendant bears burden of establishing violation of substantial rights).

[11] The majority of courts of appeals that have addressed challenges to *Gaudin*-type errors under Rule 52(b) have affirmed convictions under the fourth, discretionary prong of the *Olano* analysis where the evidence of materiality at trial was clear and overwhelming, as in this case. See *Jobe*, 101 F.3d at 1062-1063 (upholding conviction on plain-error review despite *Gaudin*-type error); *McGhee*, 87 F.3d at 186-188 (same); *Randazzo*, 80 F.3d at 632 (same); *Ross*, 77 F.3d at 1540-1541 (same); *United States* v. *Allen*, 76 F.3d 1348, 1368 (5th Cir.), cert. denied, 117 S. Ct. 121 (1996); see also *Baumgardner*, 85 F.3d at 1310 (reversing conviction on plain-error review where "the evidence of materiality was slim"); *David*, 83 F.3d at 647-648 (reversing conviction because, among other considerations,

2. The evidence of materiality at petitioner's trial was overwhelming, uncontroverted, and incontrovertible. The grand jury that had been investigating Earl Fields was the same grand jury that indicted petitioner for giving false testimony material to that very investigation. J.A. 5-6, 12, 60, 65-66. At trial, both the grand jury foreman (J.A. 61-62) and a federal agent involved in the Fields investigation (J.A. 59-60) confirmed that the grand jury had in fact been investigating Fields' drug trafficking and money laundering activities. Petitioner has never disputed that fact. Moreover, the subject matter of petitioner's testimony (the source of money for her home improvements) was self-evidently material to that investigation. The grand jury asked petitioner about that money to find out whether Fields—the father of one of petitioner's children, see J.A. 39—had hidden his drug proceeds in her real estate holdings. See J.A. 65-66. As the district court correctly determined, petitioner's false answers to that inquiry plainly had "a natural tendency to influence, or [were] capable of influencing," *Gaudin*, 115 S. Ct. at 2313, the course of the grand jury's investigation.[12]

"a jury could conceivably have concluded * * * that materiality was not ultimately proven").

[12] Petitioner contends (see Br. 32) that the district court applied something less than the beyond-a-reasonable-doubt standard in making its materiality determination. There was no hint of uncertainty in the district court's conclusion, however. The court found that the subject matter of petitioner's false testimony "would be within the purview of information that the grand jury may have been looking at in order to continue their investigation or conduct their investigation on Mr. Fields." J.A. 66. The court's use of the term "may" does not indicate a relaxed standard of proof; it merely restates the

Petitioner has never developed any theory, much less presented any evidence of her own, to contest the materiality of her false statements. At trial, petitioner limited her materiality defense to a perfunctory, one-sentence assertion that "the element of materiality has been insufficiently proven," such that "the Court ought to grant a judgment of acquittal." 2A Tr. 109. But petitioner offered no evidence and no argument to support that position. Nor did petitioner seek evidentiary development on the materiality point; to the contrary, she sought to exclude relevant materiality evidence at trial on the ground that it was "an improper matter for the jury." J.A. 61. Trial tactics may well have dictated that strategy, for no rational factfinder could question the materiality of her false testimony to the grand jury's investigation.[13]

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definition of materiality (quoted in the text), which is satisfied whenever the information at issue would naturally bear on the decisionmaker's decision. The district court expressed no doubt that petitioner's false grand jury testimony met that standard. See J.A. 65-66.

[13] Petitioner suggests (Br. 27, 39-40) that, quite apart from the court's erroneous failure to submit the materiality issue to the jury, the district court may have tainted the jury deliberations on the other elements of the offense by instructing the jury that "the questions asked the defendant, as alleged, constituted material matters in the grand jury proceedings referred to in the indictment." J.A. 72. That contention is without substance. Petitioner suggests no way in which the relevant sentence in the instructions—which petitioner herself proposed (J.A. 69-70)—could have influenced the jury's consideration of the non-materiality elements. Indeed, the trial court instructed the jury that "[y]ou must make your decision only on the basis of the testimony and other evidence presented here during the trial," 3 Tr. 128; see also *id.* at 134 ("you are here to

Petitioner therefore has not shown, and could not show, any "reasonable probability" that the jury, if properly instructed, would have found her statements immaterial; the *Gaudin* error therefore does not "undermine[] confidence in the outcome of the trial." *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1565-1566 (1995) (under "reasonable probability" test of *United States* v. *Bagley*, 473 U.S. 667, 678 (1985), "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence"). In those circumstances, reversing a conviction for *Gaudin* error would impair, not promote, "the fairness, integrity [and] public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. "What really hurts the 'reputation of judicial proceedings' is vacating a criminal conviction because of what laymen properly call a 'technicality,' that is, a technical defect which made no practical difference in the particular case." *United States* v. *Keys*, 95 F.3d 874, 883 (9th Cir. 1996) (Kleinfeld, J., dissenting), petition for cert. pending, No. 96-1089 (filed Jan. 9, 1997).

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). Concern for the "fairness" and "integrity" of judicial proceedings, therefore, supports upholding the convictions of those who are indisputably guilty,

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determine from the evidence in this case whether the defendant is guilty or not guilty"), and the materiality instruction itself was not "evidence." Moreover, the court explicitly instructed the jury that materiality "is not a matter with which you are concerned." *Id.* at 132.

who received fair judicial treatment under the prevailing practice at the time of trial, and who saw no reason to challenge that practice. It does not support reversing scores of convictions on forfeited legal grounds that had no bearing on the ultimate determination of guilt or innocence. Whether or not overwhelming evidence of guilt is sufficient to hold that an error did not affect a defendant's "substantial rights," see J.A. 87-88, such evidence is quite relevant, under well-accepted remedial principles, to the availability of discretionary relief for a defaulted claim of constitutional error. Cf. *Schlup* v. *Delo*, 115 S. Ct. 851, 867 (1995).

3. Because petitioner cannot plausibly claim that any jury would have found her false statements to have been immaterial, she relies on a passage in *Olano* leaving open the possibility that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome." 507 U.S. at 735. The possibility of that "special category" follows from this Court's observation that "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 736-737.

A trial court's failure to submit the materiality element to the jury in a trial preceding *Gaudin* does not fit within that "special category" of forfeited errors that may warrant reversal regardless of the defendant's guilt. As petitioner acknowledges (Br. 26), the district court followed "almost fifty-five years" of circuit practice in deciding the materiality issue itself rather than submitting it to the jury. At the time of petitioner's trial, the great majority of federal circuits—by a margin of eleven to one—had embraced that approach as the proper method of

adjudicating the materiality question when it is an element of an offense. See *United States* v. *Gaudin*, 28 F.3d 943, 955-958 (9th Cir. 1994) (Kozinski, J., dissenting) (citing cases), aff'd, 115 S. Ct. 2310 (1995). Indeed, the lower courts applied that rule in reliance on a 1929 decision of this Court, see *Sinclair* v. *United States*, *supra*, that was cited with approval (for another purpose) as recently as 1988. See *Kungys* v. *United States*, 485 U.S. 759, 772 (1988) (" '[T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.' ") (quoting *Sinclair*, 279 U.S. at 298).

Against that background, the practice of having the court resolve the issue of materiality, although erroneous in hindsight, is not so "egregious," *Young*, 470 U.S. at 15, as to threaten the "fairness," "integrity," or "public reputation" of all judicial proceedings in which the error occurred. *Olano*, 507 U.S. at 736. Between 1929 and 1995, thousands of perjury and false statement convictions were obtained in trials in which the judge, rather than the jury, decided the materiality element. It is implausible to suggest, as petitioner does, that those convictions were all fundamentally unfair. In a case like this—in which the defendant did not seek a jury determination at trial and has never developed any defense, let alone a colorable defense, on the materiality issue—a *Gaudin* error does not warrant the exercise of appellate remedial discretion. To reverse a conviction in these circumstances would undermine society's reliance interest in the stability of criminal convictions and would impair the very "public reputation of judicial proceedings" that *Olano* directs courts to protect. *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1997

APPENDIX

1. 18 U.S.C. 1623 provides:

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

2. Rule 30 of the Federal Rules of Criminal Procedure provides:

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

3. Rule 51 of the Federal Rules of Criminal Procedure provides:

Rule 51. Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the

action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

4. Rule 52 of the Federal Rules of Criminal Procedure provides:

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

No. 96-203

In The

Supreme Court of the United States

October Term, 1996

JOYCE B. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

ARGUMENT

I.

FEDERAL RULE OF CRIMINAL PROCEDURE 52(b) IS NOT THE EXCLUSIVE AUTHORITY FOR REVIEW OF AN ERROR NOT SUBJECT TO OBJECTION AT TRIAL.

The Government contends that Fed.R.Crim.P. 52(b) is the exclusive authority for review of "error" to which a defendant did not object at trial. Resp. Br. 9-17. The Government is wrong. Before adoption of the Federal Rules of Criminal Procedure in 1944, the Court recognized its inherent power to correct errors that occurred without objection. *See, e.g., Wiborg v. United States*, 163 U.S. 632, 658 (1896); *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Furthermore, even after adoption of the Rules, the Court did not rely on a rule or statute in fashioning the harmless error standard enunciated in *Chapman v. California*, 386 U.S. 18 (1967). *See, id.* at 46 (Harlan, J., dissenting).[1] The Court has even recently recognized that provisions other than Rule 52(b) may authorize correction of an error not raised at trial. *United States v. Olano*, 507 U.S. 725, 732 (1993) (issue not raised in *Olano*).

For example, the Government overlooks 28 U.S.C. §2106.[2] In *Grosso v. United States*, 390 U.S. 62 (1968), the

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[1] *See also*, R. Traynor, *The Riddle of Harmless Error* 42 (1970).

[2] "§2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

petitioner had not raised a claim that would have been futile under binding precedent at the time of trial but became meritorious in light of a change in law rendered on the same day as the Court decided *Grosso*. *Id*. at 71; *see also*, *Marchetti v. United States*, 390 U.S. 39 (1968). The Court concluded that, in the face of prior binding precedent, Grosso's failure to raise the issue did not constitute waiver, and expressed doubt that the newly-visible error could be reached under a plain error analysis. *Grosso*, 390 U.S. at 71. The Court, however, invoked the authority of 28 U.S.C. §2106 to reverse the conviction previously entered and affirmed on appeal. *Id*. Accordingly, the Government simply is wrong in its assertion that Fed.R.Crim.P. 52(b) constitutes the exclusive authority or standard for review in this case.

Additionally, Rule 52(b) is inapplicable to this case. Rule 52(b) governs review where a "right" has been "forfeited." *Olano*, 507 U.S. at 732. Rule 52(a) generally governs review of non-forfeited errors. *Id*. at 731. However, no "right" existed at all to a jury determination of the materiality element of any perjury offense in any circuit other than the Ninth Circuit prior to the Court's decision in *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). *See*, *United States v. Gaudin*, 28 F.3d 943, 955-58 (9th Cir. 1994) (Kozinski, J., dissenting) (citing cases). One cannot "forfeit" what one does not have at the time of the purported "forfeiture."[3] The "right" of

[3] "Forfeit" is defined as loss of a thing or right by error, fault or crime. Black's Law Dictionary 650 (16th ed. 1990); 5 Oxford English Dictionary 448 (1971). Clearly, where more than a half century of binding precedent in the petitioner's circuit, as well as all but one other circuit, rendered entirely futile and frivolous a *Gaudin* objection at the time of petitioner's trial, petitioner's failure to have been prescient of this Court's subsequent decision in *Gaudin*, and concomitant failure to raise the issue at the time of her trial, clearly cannot be characterized as "error" or "fault" of petitioner or her counsel.

petitioner to have the jury determine materiality in her trial simply did not exist at the time.[4]

Furthermore, "forfeiture," to which Rule 52(b) applies, simply is not presented in this case. "Some rights may be forfeited by means short of waiver . . . but others may not. . . . " *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (citations omitted). Among the rights that cannot be forfeited short of actual waiver is the right to trial by jury. *Id*. (Scalia, J., concurring), *citing*, *Patton v. United States*, 281 U.S. 276 (1930); *see also*, Pet. Br. 16-17, 24; Fed.R.Crim.P. 23(a).

The inescapable result is that Fed.R.Crim.P. 52(b) has no application to this case because the petitioner did not "forfeit" the right to a jury determination of the materiality element of the perjury offense charged in this case. At the time of trial, no such "right" even existed in petitioner's circuit for more than half a century prior to the petitioner's trial. *See*, Pet. Br. 26-27. As a result, application of the contemporaneous objection rule, Fed.R.Crim.P. 30, and the concomitant standard for

[4] The "error" in this case was not even "error" at the time of petitioner's trial. *See infra*, at 4-6.

review of a "forfeited" "right" under Fed.R.Crim.P. 52(b), simply are not implicated in this case.[5]

The Government solicits an explanation for why petitioner could not have raised the issue presented at trial in light of the Ninth Circuit's decision, shortly prior to her 1994 trial, in *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), *aff'd*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).[6] The Government's challenge is easily answered. First, the Ninth Circuit's *Gaudin* decision rendered that court a "maverick" among every one of its

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[5] Even the Government has recognized that the petitioner did not leave the materiality issue unchallenged, but rather sought judgment of acquittal based on insufficiency of the evidence to establish materiality. *See* Resp. Br. 5, 32, *citing*, 2A Tr. 109. Additionally, given the state of controlling law at the time of her trial, petitioner certainly cannot fairly be characterized, as the Government seeks to do, as having "simply elected not to" ask the district court to submit the materiality issue to the jury. Resp. Br. 15, n.5.

[6] The Government criticizes petitioner's failure to object not only because of the Ninth Circuit's *Gaudin* decision, but also because, at the time of petitioner's trial, the Government had petitioned this Court for a writ of certiorari in *Gaudin*. Resp. Br. 15. However, the pendency of the Government's petition for certiorari in *Gaudin* at the time of petitioner's trial is utterly meaningless for two reasons. First, it is beyond question that the Court grants certiorari in only a very small fraction of the cases in which a party seeks certiorari. *See e.g.*, R. Stern, et al., *Supreme Court Practice* 32-33 (7th ed. 1993). Second, if the pendency of the Government's petition for writ of certiorari in *Gaudin* has any significance at all, such significance is opposite to that urged by the Government; the Government's petition in *Gaudin* rendered the Ninth Circuit's decision subject to question. Stern, *supra* at 164 (certiorari granted in average of about 70 percent of cases in which Solicitor General seeks review).

sister circuits. *Gaudin*, 28 F.3d at 955 (Kozinski, J., dissenting). Second, the Ninth Circuit's position, at the time of petitioner's trial, would not have been remotely persuasive to a district court within the Eleventh Circuit given 55 years of binding Eleventh Circuit precedent.[7] *See*, Pet. Br. 26-27. In fact, the Eleventh Circuit had reaffirmed that materiality was a question of law for determination by the district court judge shortly prior to petitioner's trial. *See, United States v. Swindall*, 971 F.2d 1531, 1555 (11th Cir. 1992) (materiality is question of law subject to *de novo* review); *United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991) (materiality is question of law not to be submitted to the jury).

Third, the Ninth Circuit's *en banc* decision in *Gaudin* reaffirmed its precedent that materiality is for jury determination only with respect to 18 U.S.C. §1001 offenses, not the 18 U.S.C. §1623 offense at issue in this case. *Gaudin*, 28 F.3d at 945, 951. While the Ninth Circuit questioned the constitutionality of district judges deciding materiality in perjury cases generally, its holding was limited to §1001 cases. *Id.* at 948-49. Nowhere in its *Gaudin* decision did the Ninth Circuit overrule its prior holdings that materiality decisions in 18 U.S.C. §1623

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[7] District courts are required to follow precedent of their circuit unless a contrary decision of the Supreme Court intervenes. *See e.g., Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F.2d 1506, 1508-10 (11th Cir. 1987), *citing, e.g., In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895); *Sibbald v. United States*, 37 U.S. (12 Pet.) 488 (1838); *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). *See also, Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) ("decisions of one circuit are not binding on other circuits," and prior circuit decision may be overruled only by court of appeals *en banc*).

cases were reserved for the trial judge. *See, United States v. Prantil*, 764 F.2d 548, 557 (9th Cir. 1985); *United States v. Dipp*, 581 F.2d 1323, 1328 (9th Cir 1978); *United States v. Sisack*, 527 F.2d 917, 920 n.2 (9th Cir. 1975); *United States v. Percell*, 526 F.2d 189, 190 (9th Cir. 1975); *Gaudin*, 28 F.3d at 955, 957-58 (Kozinski, J., dissenting) (criticizing *implicit* overruling of precedent that materiality is decided by trial judges under statutes other than §1001). The Ninth Circuit previously had specifically held its decision in *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979), that materiality must be determined by a jury, was limited only to §1001 cases. *See United States v. Flake*, 746 F.2d 535, 537-38 (9th Cir. 1984); *United States v. Larm*, 824 F.2d 780, 783 (9th Cir. 1987); *United States v. Clark*, 918 F.2d 843, 845-46 (9th Cir. 1990). As a result, the Ninth Circuit's decision in *Gaudin* was legally meaningless in the Eleventh Circuit (and every other circuit besides the Ninth, and there only in §1001 cases) at the time of petitioner's trial. Principled lawyering precluded petitioner's counsel from making the trial objection demanded by the Government.

II.

THE CONTEMPORANEOUS OBJECTION RULE AND RELATED PLAIN ERROR STANDARD OF REVIEW CANNOT APPLY WHERE PREVENTING THE JURY FROM DECIDING MATERIALITY WAS NOT EVEN "ERROR" AT THE TIME OF PETITIONER'S TRIAL.

As set forth above, the so-called "error" in the petitioner's case was compelled by binding precedent at the time of her trial in every circuit other than, perhaps, the

Ninth Circuit. The contemporaneous objection requirement of Fed.R.Crim.P. 30 therefore simply is inapplicable in this case. Perhaps if the state of the law had actually been unclear at the time of her trial, petitioner could be faulted for not having objected to the trial judge deciding materiality. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (reserving decision on "special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified."). At the time of petitioner's trial, though, the law was not unclear but rather was crystal clear that the determination of the materiality element of a perjury charge was reserved for the trial judge. The only standard that can properly be applied is that of *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), and application of the *Griffith* rule requires reversal of the petitioner's conviction.[8]

The Government protests that inquiries as to whether a pertinent legal principle was clear or unclear at a given time would constitute "amorphous" analyses that would "mire the courts of appeals in indeterminate inquiries." Resp. Br. 15, 21. The Government's argument is a fallacy. First, "the very essence of judicial duty" is "to say what

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[8] Additionally, *Griffith* and *Linkletter v. Walker*, 381 U.S. 618 (1965), prohibit application of a plain error standard that considers only the plainness or clarity of error at the time of trial, contrary to the standard urged by the United States. Resp. Br. 19-22. In fact, the Government's position is internally contradictory to the extent that it protests against a requirement of inquiry into the legal futility of an objection at the time of trial, Resp. Br. 15, 21, while somehow contending that determination of whether an error was "plain" at the time of trial would constitute an inquiry of any greater judicial ease, Resp. Br. 22.

the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). Furthermore, courts often are required to determine what the law was at a particular point in time in determining, for example, whether collateral relief from a conviction is warranted where the collateral review petitioner appears to rely on a new rule of law not in existence at the time of trial. *See, e.g., Butler v. McKellar*, 494 U.S. 407 (1990). The same inquiry is required to determine whether a governmental actor is entitled to qualified immunity from suit based on whether the right the official is accused of violating was clearly established at the time of the conduct at issue. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The Government's protestations of appellate difficulty fall of their own weight.

The Government's contention that the principle of *Griffith v. Kentucky*, 479 U.S. 314 (1987), is inapplicable to aid the petitioner also fails on its face. First, the Government argues incredibly that the "[p]etitioner has no special claim to more favorable treatment" than a petitioner seeking collateral relief under *Gaudin*. Resp. Br. 23-24. Such an argument is patently wrong. *Compare, Griffith*, 479 U.S. at 328 ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past") *with Teague v. Lane*, 489 U.S. 288 (1989) ("new rule" generally not a basis for relief on collateral review); *see also, Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (burden of showing prejudice from

erroneous jury instruction greater on habeas corpus petitioner than burden of establishing plain error on direct appeal).

Furthermore, the Government misleadingly argues that the petitioner is not entitled to the relief otherwise required by *Griffith* because she did not object at her trial, while the petitioners in *Griffith* did object to the error in that case. Resp. Br. 24. The Government, however, mistakenly contends that the petitioner must be situated similarly to the *Griffith* petitioners in order to obtain relief. That is the wrong comparison.

The defendant similarly situated to the petitioner in this case is Michael E. Gaudin, who secured relief in this Court from the trial judge having determined materiality in his false statements case, *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), even though "Gaudin did not object to the instruction that removed the question of materiality from the jury." 28 F.3d at 951.[9] The petitioner in this case, pursuant to the *Griffith* rule, is entitled to the benefit of *Gaudin* because she is similarly situated to Mr. Gaudin.

> The fact that the new rule may constitute a clear break with the past has no bearing on the actual inequity that results when only one of many similarly situated defendants receives the benefit of the new rule.

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[9] In *Gaudin*, the Government did not challenge the Ninth Circuit's holding of plain error, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 458 (Rehnquist, C.J., concurring), in light of prior Ninth Circuit precedent that materiality is determined by the jury in a §1001 case. *See supra*, at 5-6.

Griffith, 479 U.S. at 327-28 (citation and internal quotation omitted). The "integrity of judicial review requires" application of such a new rule "to all similar cases pending on direct review." *Id.* at 323. As the Court, speaking through Chief Justice Marshall, held in one of its earlier cases:

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, lawful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 102, 110 (1801). Under these principles, the judgment below should be reversed.

III.

THE GOVERNMENT'S CHARACTERIZATIONS OF WHAT IS "TECHNICAL" AND WHAT IS "EGREGIOUS" ARE WRONG.

The Government misdescribes errors that fairly can be considered mere technicalities and those that are egregious. The Government argues that the error in this case was "unimportan[t]," Resp. Br. 25, "technical," Resp. Br. 33, *quoting United States v. Keys*, 95 F.3d 874, 883 (9th

Cir. 1996) (Kleinfeld, J., dissenting), and "not so 'egregious,' " Resp. Br. 22, 35. The Government's characterizations of the *Gaudin* error at issue are backwards.[10]

First, the Government contends that the *Gaudin* error presented cannot be described as egregious because, at the time of petitioner's trial, withholding the materiality element of a false statement case from the jury was accepted in all but one federal circuit, *see Gaudin*, 28 F.3d at 955 (Kozinksi, J., dissenting) (collecting cases), even though that practice violated defendants' rights to due process of law and trial by jury. *Gaudin*, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 453-58 (1995). The Court previously has rejected the Government's argument in this regard, in reliance on supposed historical practice. *Id.* at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 453.[11] Second, the

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[10] The absence of a constitutionally complete verdict, as presented in this case, cannot be cured or overcome by a technical nicety of a procedural rule. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("a law repugnant to the constitution is void."). *See* Pet. Br. 22-23, 31 n.9, 35-36. *See also, e.g., Weiler v. United States*, 323 U.S. 606, 611 (1945) (reviewing judges may not constitutionally substitute their judgment for that of a jury on a question constitutionally reserved for the jury).

[11] The Government even makes the demonstrably false assertion that withholding materiality from the jury "enjoyed the approval of . . . the highest court in the land . . . " Resp. Br. 25. This Court, however, has addressed the issue on only one occasion and concluded that criminal defendants have an unqualified right for a jury determination of materiality under a standard of proof beyond a reasonable doubt. *Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444. This Court at no time approved withholding the essential element of materiality from the jury in a perjury case. In fact, the case on which the government relies, *Sinclair v. United States*, 279 U.S. 263 (1929),

egregiousness of the error is magnified, not minimized, by the breadth of its approval among the circuits prior to *Gaudin*.

The Government's argument that *Gaudin* error is merely technical and not egregious flies in the face of *Gaudin*, *Sullivan v. Louisiana*, 508 U.S. 275 (1993), *In re Winship*, 397 U.S. 358 (1970), *Bollenbach v. United States*, 326 U.S. 607 (1946), and *Davis v. United States*, 160 U.S. 469 (1895). The Government's characterization further contravenes the plain language of Article III and the Fifth and Sixth Amendments, and, on the record in this case, is blatantly belied by the clear constitutional prohibition against even partial directed verdicts of guilt in criminal cases. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947); *Sparf & Hanson v. United States*, 156 U.S. 51, 105 (1895). *See also*, Pet. Br. 11-19 (discussing fundamental nature of right to trial by jury in criminal case); Jt. App. 72 (trial court instructing jury that government had prevailed on element of materiality). The error at issue in this case accordingly cannot be characterized as merely technical, but rather is clearly egregious.

The only "technicality" before this Court is raised by the Government in its effort to preclude relief for the petitioner. This technical issue is the contemporaneous objection requirement embodied within Fed.R.Crim.P. 30 and 51, and enforced by the strictures of Rule 52(b). Even

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involved *refusal* to answer "pertinent" questions, not answers given but alleged to have been false and material.

if issues of procedural default can be characterized in some situations as other than technical, that is not this case where the petitioner, at the time of trial, had no "right" to "forfeit" and, even if she can be described as having had the right at the time of trial, the right was incapable of forfeiture without actual waiver. *See supra*, at 2-4. Accordingly, the *Gaudin* error in this case not only is of such a nature as to preclude application of Rule 52(b) standards to petitioner but also is precisely the type of particularly egregious error that must be corrected even if the Rule 52(b) standards are deemed to apply.

IV.

REVIEW IN THIS CASE CAN ONLY BE FOR REVERSIBLE ERROR.

Because Fed.R.Crim.P. 52(b) standards simply are inapplicable to the *Gaudin* error presented in this case, only two potential standards of review remain. First, the issue presented may constitute straightforward structural reversible error incapable of review for harmlessness or prejudice under any standard of Rule 52. *See United States v. Wiles*, 102 F.3d 1043, 1060-61 (10th Cir. 1996). Second, even if Rule 52(a) is applicable, the fundamental error at issue simply can never be held harmless pursuant to *Sullivan v. Louisiana*, 508 U.S. 275 (1993), because of the absence of any verdict upon which analysis for harmlessness, or any sort of prejudice, can operate. *See United States v. Keys*, 95 F.3d 874, 880-81 (9th Cir. 1996).

The Government incredibly dismisses the significance of the partial directed verdict that occurred in the petitioner's trial. Resp. Br. 32-33 n.13; Jt. App. 72. The trial judge not only instructed the jury that it must not

consider the element of materiality, but affirmatively directed the jury that the Government had prevailed on one of the four elements of the charged offense. Such a partial directed verdict not only is necessarily prejudicial but also clearly removed from the jury any ability to find the existence of the facts predicate to materiality, utterly precluding the jury from ever having found "the existence of every fact necessary to establish every element of the offense beyond a reasonable doubt." *Carella v. California*, 491 U.S. 261, 266 (1989), *quoting In re Winship*, 397 U.S. 358, 363 (1970), and *Rose v. Clark*, 478 U.S. 570, 580-81 (1986). Additionally, while the Government cites authority supporting affirmance of a conviction where an omitted element necessarily has been found by the jury in some other manner, Resp. Br. 27-29, the Government has not even attempted to demonstrate that the jury in petitioner's trial otherwise necessarily found the existence of the element of materiality, particularly where the trial judge specifically told the jury not to do so because the judge had already done so. Jt. App. 72. The jury in petitioner's trial simply never, in any manner, found even a single predicate fact relating to materiality.

The Government further dismisses the petitioner's demonstration that the district judge determined materiality under a standard less than one of beyond a reasonable doubt. Resp. Br. 31-32 n.12. As with its approach to the impact of a partial directed verdict and its failure to explain any theory of how the jury necessarily found the existence of facts demonstrating materiality, the Government seeks to avoid these issues because it cannot prevail on these points. The relaxed standard of proof employed by the trial judge is self-evident from his language, Jt.

App. 66, and clearly contrary to the due process requirements set forth in *In re Winship*, 397 U.S. 358, 363 (1970).

Accordingly, the appropriate standard of review in this case is the direct review standard indicated in *Carella* and *California v. Roy*, ___ U.S. ___, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996).[12] In the absence of a jury finding of every fact necessary to establish each element of the offense beyond a reasonable doubt, a reviewing court simply lacks the constitutional authority to inquire into the existence of prejudice, *vel non*, under any Rule 52 standard of review. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993). Furthermore, where, as in this case, the "omitted" element actually was subject to a directed verdict of which the jury was instructed, actual prejudice is established by the petitioner.[13]

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[12] The manner of review for the issues presented is most aptly that described similarly by the only two circuits to have squarely confronted the issues *en banc*. *See, United States v. Keys*, 95 F.3d 874 (9th Cir. 1996) (*en banc*); *United States v. Wiles*, 102 F.3d 1043 (10th Cir. 1996) (en banc); Pet. Br. 25-32.

[13] The Government suggests that *Gaudin* does not improve the "accuracy" of trial verdicts or alter "bedrock procedural elements essential to the fairness of a proceeding." Resp. Br. 23 n.7 (citations omitted). That is flatly wrong. *See Gaudin*, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 453 (1995); Pet. Br. 15-16. The Government inappropriately seeks in this case on direct review to litigate how *Gaudin* issues should be considered on collateral review. In any event, defendants' rights to trial by jury under a standard of proof beyond a reasonable doubt clearly are bedrock principles mandated to secure accurate trial results. *See* Pet. Br. 11-19; Kaufman, A Fair Jury – The Essence of Justice, 51 *Judicature* 88, 91-92 (October 1967) ("Trial before a jury of one's peers is one of a democratic society's primary techniques for achieving truth.").

V.

EVEN REVIEW UNDER FED.R.CRIM.P. 52(b) REQUIRES RELIEF.

The Government ignores the inquiry of whether the *Gaudin* issue in this case affected the petitioner's "substantial rights." Resp. Br. 29-30. That is because the Government, and the view of the court of appeals below, cannot prevail on the substantial rights inquiry. Furthermore, in this case, the substantial rights and discretion inquiries of Rule 52(b) are inextricably interrelated.[14]

Although the Court has held that prejudice is among the considerations of the inquiry of whether substantial rights were affected, *see Olano*, 507 U.S. at 734-35, that is not the only appropriate inquiry, *id.* at 735-37. The petitioner's substantial rights were affected directly by deprivation of her rights to due process of law and trial by jury, and freedom from even a partial directed verdict, secured by Article III and the Fifth and Sixth Amendments of the Constitution. Additionally, the petitioner suffered actual prejudice as a result of the directed verdict at trial. The determination by the court of appeals that the petitioner's substantial rights were not affected because of the weight of the evidence directly contravenes the principle that judges cannot weigh prejudice in the absence of a complete constitutional jury verdict because such an error simply is incapable of review for prejudice. *Sullivan v. Louisiana*, 508 U.S. 275, 279-80

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[14] Basic norms of constitutional adjudication require that plain error analysis consider the clarity of an error at the time of appellate adjudication on direct appeal. *Cf. Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); Pet. Br. 36-39; Pet. for Cert. 16-19.

(1993). Also, as set forth above, the directed verdict that occurred in petitioner's trial meets the burden under Rule 52(b) of demonstrating actual prejudice.

For like reasons, the error at issue seriously and negatively affects the fairness, integrity and public reputation of the judicial proceedings in this case. *See Olano*, 507 U.S. at 731. The trial proceeding was unfair because the petitioner was deprived of her rights to due process and trial by jury and was the victim of a partial directed verdict by the trial judge. The integrity of the trial process was critically undermined for exactly the same reasons. Finally, where judicially-endorsed violations of these core constitutional rights occurred in petitioner's trial and others, these deprivations clearly undermine the public reputation of the judicial process by subjecting to public question whether judicial mistake can result in the loss of a criminal defendant's clearly established rights to due process of law, trial by jury and freedom from directed verdict.[15]

Furthermore, the *Gaudin* issue in this case infected the entire trial process. The petitioner's entire trial would have been conducted differently had materiality been, at the time, subject to jury determination.

As the Government implicitly acknowledges, the only direct evidence that any of the petitioner's grand

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[15] The court of appeals' review in this case also undermines the fairness, integrity and public reputation of judicial proceedings by substituting appellate judges' views of the weight of the evidence for that of juries in violation of Article III and the Fifth and Sixth Amendments. *See* Pet. Br. 15-19, 21-22.

jury testimony was incorrect was the Government's evidence that the petitioner's beneficiary had died in 1982, in conflict with her testimony that she and her mother had received the funds in question from Gerald Talcott in "probably" 1985 or 1986. Resp. Br. 3-4; Jt. App. 7, 22-24. The petitioner's qualified answer to the grand jury regarding the date of receipt of the funds, in testimony given in 1993, many years after the date of receipt to which she testified, clearly is immaterial to any grand jury inquiry into the disposition of funds Earl Fields may have received from unlawful activities. The evidence presented by the Government, even in the light most favorable to the prosecution, *see* Resp. Br. 3-4, did not present a clear or overwhelming case of proof of actual falsity of the petitioner's grand jury testimony other than the clearly immaterial date discrepancy.

Additionally, nowhere in petitioner's testimony before the grand jury was she presented any direct opportunity to affirm or deny whether any of the funds for improvements to her home had come from Fields. Jt. App. 14-57. The trial jury may have decided that it did not believe the petitioner's testimony that the funds for the improvements came from Mr. Talcott without deciding whether it believed that those funds actually came from Mr. Fields. In other words, even if the petitioner's testimony that the funds at issue came from Mr. Talcott was false, if the funds actually came from a source *other* than Fields, the testimony would not be material in the least to the grand jury's specific inquiry as to the disposition of *Mr. Fields'* allegedly unlawful income. The grand jury was investigating Mr. Fields, Jt. App. 59-62, not

whether the petitioner had used funds from any source other than Mr. Fields to improve her home.

Furthermore, the petitioner had specifically acknowledged to the grand jury that Mr. Fields had provided approximately $27,000.00 to her to assist in the purchase of the real estate. Jt. App. 39, 48-49. The grand jury, accordingly, was provided by the petitioner with testimony that Mr. Fields had disposed of some money by providing it for investment in the real estate at issue. Whether Mr. Fields had provided a greater amount of money for the improvement of the property was not a material question capable of influencing the grand jury's decision whether to indict Mr. Fields on any charge relating to the disposition of his income. *See Gaudin*, 515 U.S. at ___, 115 S.Ct. at ___, 132 L.Ed.2d at 449 (restating definition of "materiality").

The "error" in this case structurally infected the entirety of the trial process. The absence of a jury finding of materiality renders the verdict a nullity, incapable of judicial review for prejudice. Furthermore, actual prejudice to the petitioner resulted from the jury being given a directed verdict of guilt by the trial judge on an essential element of the offense charged. Accordingly, the judgment below must be reversed.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

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Date: February 14, 1997

(5)

No. 96-203

IN THE

Supreme Court of the United States

October Term, 1996

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF DAVID R. KNOLL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES:

OTHER AUTHORITIES:

No. 96-203

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STATEMENT OF INTEREST

David Knoll is an individual citizen and resident of the State of New York, who presently stands convicted of one count of violating 18 U.S.C. § 1001. At the trial where he was convicted of this charge, which occurred prior to this Court's decision in United States v. Gaudin, 115 S.Ct. 713

(1995), the judge told the jury, without objection, that: "the materiality of the fact allegedly falsified, concealed or covered up is not a matter with which you are concerned, but rather a question for the Court to decide. You are instructed that the facts charged in the indictment are material facts." [1] As one ground of his pending appeal to the United States Court of Appeals for the Second Circuit, Mr. Knoll has asked that Court to reverse his conviction because the judge's handling of the materiality element at trial violated his constitutional right to have the jury render a decision on that element of this offense, as established in Gaudin. [2] In response to this argument, the Government has conceded the Gaudin error below, but has maintained that it was not "plain" error and was, in fact, "harmless" error.

The Gaudin issues in Mr. Knoll's pending appeal are, therefore, identical in many respects to the Gaudin-related issues on which review has been granted in this case. Since a decision by this Court on those issues could obviously impact the Second Circuit's resolution of his appeal, Mr. Knoll has a significant and concrete interest in this Court's

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1 Tr. at 6456-6457.

2 In Gaudin, this Court unanimously held:

> The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statement infringed that right.

115 S. Ct. at 2320.

decision in this case. In addition, since undersigned counsel for Mr. Knoll has already briefed and argued these same issues before the Second Circuit, he has some expertise with these issues that may help to facilitate the Court's ultimate resolution of this case. Counsel for both parties to this case have graciously consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

1. Post-Gaudin claims that have arisen in the federal courts take one of two forms: cases where a trial judge has directed a verdict against a criminal defendant on the element of materiality and cases where the judge has merely failed to instruct the jury on that element. This case, like Mr. Knoll's case, is the directed verdict form of such a claim. Since at least 1895, when this Court decided Sparf and Hansen v. United States, 156 U.S. 51, 105-06 (1895), this Court's decisions have reflected a uniform constitutional prohibition against such a directed verdict because of its patent infirngement of the right to trial by jury. Fidelity to the principles of this Court's prior decisions in this area commands a reversal of the directed verdict against petitioner below.

2. Prior to this Court's Gaudin decision, the established law in ten of the eleven federal judicial circuits provided that the element of materiality was to be decided by the court, rather than the jury. Trial counsel litigating such criminal cases involving this element prior to Gaudin, in these ten judicial circuits, had no sound basis for asking the trial court to allow that element to be decided by the jury and/or for objecting to its refusal to do so, since the trial judge was bound by precedent to act as he did. In such a circumstance, no purpose would be served by requiring a contemporaneous objection at trial to the judge's handling of the materiality

element. Accordingly, the plain error rule, which is designed to enforce the failure to raise such a contemporaneous objection, should be likewise inapplicable to the appeal of such post-Gaudin issues.

3. In Arizona v. Fulminante, 111 S. Ct. 1246 (1991), this Court established an analytical dichotomy for determining when harmless error analysis applied to constitutional errors at trial: classic trial errors are subject to such analysis, while structural errors are not. In Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), this Court made it clear that the actual deprivation of a jury verdict in a criminal case constituted "structural error," and identified the "directed verdict" as one example of such an error. Since this case involves a directed verdict against petitioner on the element of materiality, the error here was plainly a "structural error" which cannot be analyzed for prejudice under either harmless or plain error principles.

ARGUMENT

As amicus curiae, Mr. Knoll has attempted to pay strict heed to this Court's admonition against repeating facts and legal authorities to be presented to the Court by the parties. As a result, much of the general constitutional and caselaw background for the arguments herein has been omitted because it will undoubtedly appear in the briefs of the parties. The following arguments, therefore, must be read in context with the related points made in the principal briefs filed with the Court.

The issues before this Court for review in this case all implicate the meaning and scope of the "right to a . . . trial by . . . jury" guaranteed to a criminal defendant by the Sixth Amendment to the United States Constitution. These issues

have all, quite naturally, arisen in the wake of this Court's decision in United States v. Gaudin, 115 S. Ct. 2310 (1995), which reaffirmed the importance of that jury trial right for each and every element of a criminal charge. The Court's decision in this case should further reinforce the importance of that constitutional command against the admittedly seductive concerns of expediency that underlie both the Eleventh Circuit's decision below and the respondent's position herein.

I
A TRIAL JUDGE CANNOT DIRECT A VERDICT AGAINST A CRIMINAL DEFENDANT NO MATTER HOW OVERWHELMING THE EVIDENCE MIGHT APPEAR TO BE

It is, by now, an unassailable proposition that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction." United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). Yet that is precisely what happened below, as in Mr. Knoll's case, when the trial judge "instructed the jury that Johnson's statements to the grand jury were material." (Pet. App. at 4a)(emphasis added). Since "the theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them," City of Los Angeles v. Heller, 475 U.S. 796, 798 (1986), the trial judge's instruction on materiality effectively -- and unconstitutionally -- directed a verdict against the defendant on that element of the offense with which he was charged.

This "directed verdict" instruction in this case represents one variant of the post-Gaudin decisions by the

lower federal courts that this Court has been asked to review. The other variant is represented by those decisions where the trial judge simply fails to instruct the jury at all on the materiality -- or another similarly required -- element of the offense. See generally Roy v. Gomez, 81 F.3d 863, 866 (9th Cir. 1996)(en banc)(identifying distinction between cases in which "a court instructs the jury that an element of the crime has been established as a matter of law" and cases in which a court "simply fails to alert the jurors they must consider it"). [3] The critical distinction between these two variants of the issue, however, has been missed by many of the courts confronting post-Gaudin claims, [4] and apparently by the Government as well. [5] Instead, both variants of the issue have routinely been lumped together under the general

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[3] The Ninth Circuit's decision in Roy v. Gomez was subsequently reversed by this Court on other grounds relating to the nature of the "harmless error" test used by that court to evaluate the habeas corpus claim before it. See California v. Roy, 1996 WL 633365 (U.S. 11/4/96).

[4] But see Gaudin, 115 S.Ct. at 2318 ("Horning's holding that it was harmless error, if error at all, for a trial judge effectively to order the jury to convict has been proved an unfortunate anomaly in light of subsequent cases.")

[5] For example, in its brief concurring in appellant's request for review in this case, the Government asserted that the decision below "conflicts with the Ninth Circuit's recent decision in United States v. Keys, No. 93-50281, 1996 WL 512389 (Sept. 11, 1996)." Certiorari Brief For The United States ("Govt. Cert. Br.") at 4. However, the decision below involved the "directed verdict" variant of post-Gaudin claims, while Keys simply involved the "omitted" instruction variant of the same.

category of analysis for erroneous jury instructions. The distinction cannot be so easily overlooked.

Constitutionally, it simply makes a world of difference in the analysis whether the trial judge directed a verdict against the defendant on the element of materiality or merely failed to instruct the jury at all on that element. In the latter circumstance, "[e]ven though an element of the offense is not specifically mentioned, it remains possible the jury made the necessary finding." Roy v. Gomez, 81 F.3d at 867. In the former circumstance however, given our systemic presumption that juries act in accordance with the instructions they are given, there is no possibility that "the jury made the necessary finding." Thus, in the "directed verdict" variant, it is always necessarily the case that a defendant has been actually deprived of his constitutional right to have the jury decide the element of the offense in question, while in the omitted element variant the same conclusion need not always be true.

In this "directed verdict" variant of the post-Gaudin cases, therefore, there is no way to affirm the decision below without concluding that it is constitutionally permissible for a trial judge to override a defendant's constitutional right to trial by jury and direct a verdict against him. The judge's conduct simply leaves no analytical room for appellate hypothesizing whether the jury in fact made a decision on the element in question against the defendant. The jury was expressly told not to do so, and that ends any such inquiry. Thus, this case squarely presents this Court with passing upon the propriety of a directed verdict against the defendant in a criminal case.

But in an unbroken line of instructional error cases, this Court has repeatedly referred to the possibility of such a directed verdict as a complete constitutional taboo. For example, in Connecticut v. Johnson, 460 U.S. 73 (1983), the

plurality opinions by Justice Blackmun and Justice Powell vigorously disagreed whether a conclusive Sandstrom instruction amounted to a directed verdict against the accused or not, [6] but the unanimously agreed upon premise for this debate was the fact that a directed verdict on an element of a criminal offense was constitutionally impermissible. Next, in Rose v. Clark, 478 U.S. 570 (1986), the Court adopted Justice Powell's position in Connecticut v. Johnson that a Sandstrom presumption was not equivalent to a directed verdict (id. at 580), but in doing so reaffirmed that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict" because "in such a case . . . the wrong entity judge[s] the defendant guilty." Id. at 578. Similarly, in Pope v. Illinois, 481 U.S. 497 (1987), the Court reaffirmed that the bottom-line of its analysis was to ensure that "the jurors were not precluded from considering the question" at issue. Id. at 503. Finally, in Carella v. California, 491 U.S. 263 (1989), Justice Scalia's concurrence again reiterated the established dogma that it is "constitutionally impermissible for a judge to direct a verdict for the State." Id. at 268. [7]

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[6] Compare 460 U.S. at 84 (Blackmun, J.)("conclusive presumption . . . is the functional equivalent of a directed verdict") with 460 U.S. at 95 (Powell, J.)("directed verdict removes an issue completely from the jury's consideration" while "a presumption, by contrast, leaves the issue ultimately to the jury")

[7] As partial support for this point, Justice Scalia quoted from this Court's decision half a century ago in Bollenbach v. United States, 326 U.S. 607, 614 (1946): "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and

Nonetheless, we are told by the Government that this Court should have no concern about the defendant's constitutional right to trial by jury "where, as here, no reasonable juror could have found a defendant's false statements immaterial." (Govt. Cert. Br. at 7-8)(emphasis added). [8] But the relevant inquiry under this Court's jurisprudence has never been whether a jury presented with the Gaudin question could -- or would -- have convicted petitioner, but rather whether the jury that tried him substantially answered the Gaudin question adversely to him in the course of its actual deliberations. [9] With respect to the "omitted element" variant of post-Gaudin claims, the courts and counsel can debate the proper answer to this inquiry on a case-by-case basis. [10] With respect to the

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standards appropriate for criminal trials."

[8] The highlighted verb form used by the Government to make this point only highlights the flaw in the Government's argument. The Government's verbiage is strikingly similar to that which was expressly rejected in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), when this Court found that it was "not enough" for an appellate court to conclude "that the jury would surely have found petitioner guilty beyond a reasonable doubt." Id. at 2082.

[9] See generally Yates v. Evatt, 500 U.S. 391, 403 (1991)("To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question").

[10] This is the basis underlying the many simple instructional error cases relied upon by the Government and the court below where, despite the defective jury charge, there was a reason to conclude that the jury still necessarily decided

"directed verdict" variant of post-Gaudin claims however, as here, there can be no debate about the proper answer to the relevant inquiry; when a jury is affirmatively told not to pass upon the element in question, there is no ground for assuming that it did anything but follow that instruction. [11]

More importantly, if the directed verdict against petitioner is sustained in this case, as the Government requests, because of the assertedly conclusive nature of the evidence on the materiality element of this offense, then the door will be opened to the rendition of directed verdicts in almost every other circumstance imaginable. The reality is that the evidence against most criminal defendants in the courts of this country is frequently overwhelming. As a result, the first and foremost battleground for defendants in every criminal trial will thus become endeavoring to convince the judge that the evidence against them is not conclusive, which would stand the constitutional right to a jury trial on its head. This directed verdict argument by the Government presents the Court with an extremely slippery slope which is better off avoided in favor of a level, and constitutional, playing field.

The judiciary's supreme authority is "to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In a criminal case, however, it is the jury's supreme authority to say what the facts are. The decision below, and

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the element of the offense in question.

[11] It would, of course, open up an entire Pandora's box of additional jurisprudential problems if the Court were to abandon the time-honored assumption that juries follow the instructions they are given, and there is certainly no factual basis for doing so herein.

those like it in other federal courts around the country, blur this fundamental division of power. But such "power[s] definitely assigned by the Constitution," Williams v. United States, 289 U.S. 553, 580 (1933), cannot be so easily reassigned in the interest of a "more efficient" criminal justice system. As this Court has previously held, "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised." INS v. Chadha, 462 U.S. 919, 945 (1983). "[U]nder our system of justice, juries alone have been entrusted with th[e] responsibility" for determining criminal guilt, Weiler v. United States, 323 U.S. 606, 611 (1945)(Black, J.), and it is with "juries alone" that this awesome responsibility should remain.

II

AN ERROR THAT IS UNOBJECTED TO AT TRIAL BECAUSE IT WAS CONSISTENT WITH THEN-EXISTING LAW SHOULD BE REVIEWED ON APPEAL UNDER RULE 52(A)

In the decision below, the Eleventh Circuit held that "because Johnson did not object at trial to the district court's determination of the materiality issue, we review the district court's decision to reserve the materiality decision for itself for plain error" under Rule 52(b). (Pet. App. at 6a-7a)(emphasis added). The Government agrees with the standard of review chosen by the Eleventh Circuit. [12] The

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[12] See Govt. Cert. Br. at 7 ("We believe that the plain error standard of Rule 52(b) is applicable to a district court's failure to submit the materiality question to the jury in the

petitioner disagrees with this standard of review "where, as in the present case, a motion or objection would have been utterly frivolous and wasteful in light of clear, binding precedent at the time of the trial and so was not raised." (Pet. at 15-16). The distinction is important because of the practical differences in the application of the two standards of review, including the "discretionary" aspect of relief under the plain error standard which is not present under the ordinary error standard of Rule 52(a). [13]

We submit that an unobjected to error in the circumstances of this case should be reviewed under Rule 52(a). In this regard, Rule 52 of the Federal Rules of Criminal Procedure must be read in conjunction with Rule 51, which provides the affirmative justification for the contemporaneous objection rule at trial. Rule 51 states, in pertinent part:

> it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor . . ..

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absence of a timely objection, whether or not such an objection would be inconsistent with a 'solid wall of circuit authority.'")(quoting United States v. Keys, supra).

[13] As one leading commentator has recognized, Rule 52 actually "recognizes three classes of errors, though only two are mentioned by name in the rule;" these are "harmless error," "reversible error," and "plain error." 3A Wright, Federal Practice and Procedure (Criminal 2d), § 851 at 294-95 (1982).

The purpose of this rule is plainly to require trial counsel to make known to the trial court both his requests for court action and his objections to court action so that the trial judge has the opportunity to make a fully informed decision on what action to take. [14] The goal of the contemporaneous objection rule is to eliminate the "criminal trial [as] a game for sowing reversible error in the record." Kotteakos v. United States, 328 U.S. 750, 758-60 (1946). [15]

But neither the purpose nor the goal of this rule is furthered by its application to a situation where binding judicial precedent leaves a trial court with no choice as to what action it must take. Further informing the trial court would be a meaningless exercise in such a circumstance because the trial court is bound to act as established precedent dictates regardless of how it is so informed, just as there would be no point in endeavoring to sow the error in question into the record since it would be present already as a matter of established precedent. It would thus be an "unreasonable result" to interpret the contemporaneous objection rule to be

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[14] See, e.g., United States v. Young, 470 U.S. 1, 15-16 (1985)(plain error rule is designed "to encourage all trial participants to seek a fair and accurate trial the first time around").

[15] Accord, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-39 (1940)("counsel for the defendant cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point [as] . . . improper and prejudicial").

applicable to such a situation. American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982). [16]

The final clause of Rule 51 also supports a finding that the contemporaneous objection rule should not apply to situations where an objection would be futile as a matter of law. That clause provides that "if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party." Fed. R. Crim. Pro. 51. This qualification to the contemporaneous objection rule fits perfectly, of course, with the purpose and goal of the rule as described above. It also fits perfectly with the point argued herein, restated as "if a party has no opportunity [to influence] a ruling or order, the absence of an objection does not thereafter prejudice that party." [17] When a "solid wall" of circuit authority inevitably preordains a certain ruling or order, then trial counsel cannot influence the court's action with respect to that ruling or order and he should be under no

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[16] See also Douglas v. Alabama, 380 U.S. 415, 422-23 (1965)("In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient . . .. No legitimate state interest would have been served by requiring repetition of a patently futile objection . . .."). See generally 3A Wright, supra, § 842 at 290 & n.16.

[17] See also United States v. Wiles, 1996 WL 707539 at * 10 (10th Cir. 12/10/96)(en banc)(citing the final clause of Rule 51 as support for the conclusion that defendants had not waived their Gaudin challenges since "[a]t the time of their trials, they were not aware of this right" and, therefore, had no known "opportunity to object").

obligation to go through a pointless ritual of objecting to its entry "for the record." See California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 284 (1987)(thing may be within the letter of a statute and yet not within the statute because not within its spirit). [18]

Beyond the foregoing interpretive support for the conclusion that the contemporaneous objection rule should be inapplicable to this case, there is also a significant practical policy concern buttressing that conclusion as well. As the Ninth Circuit has noted, in such circumstances:

> were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on their settled principles out of hope that those principles will be later overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency.

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[18] See also 3A Wright, supra, § 842 at 289-90 ("The general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion. If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance.")

United States v. Scott, 425 F.2d 55, 57-58 (9th Cir. 1970)(en banc). [19] The Second Circuit has reached a similar conclusion:

> [w]ere we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeal of even well-settled points of law. We see no value in imposing a responsibility to pursue such a 'patently futile' course.

Ingber v. Enzor, 841 F.2d 450, 454-55 (2d Cir. 1988). [20] The truth is that there is no value to be added to the criminal justice system by dictating that defense counsel follow such a course of conduct and, therefore, this Court should not do so.

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[19] As a result, "[s]ince 1970," the Ninth Circuit has "advised criminal defense counsel in [its] circuit that when faced with a 'solid wall of circuit authority' endorsing a jury instruction, no objection to that instruction need be registered in the trial court to preserve the point on appeal should that 'solid wall' suddenly crumble in the interim and render the instruction defective." Keys, 1996 WL 512389 at * 4.

[20] Accord, United States v. Tillem, 906 F.2d 814, 825-26 (2d Cir. 1990)(distinguishing between when there is, and is not, sufficient "established Circuit authority to make such an objection futile"). Cf. Peck v. United States, 1995 WL 764340 at * 6 (2d Cir. 12/28/95)(discussing "cause to excuse a failure to pursue" an issue under habeas jurisprudence)(the Peck decision was subsequently reheard by the Second Circuit en banc, with no decision yet, on other grounds).

Accord, United States v. American Trucking Assn., 310 U.S. 534, 543 (1940)(court will avoid interpretation that leads to futile results). [21]

Rules 51 and 52 of the Federal Rules of Criminal Procedure undeniably serve important purposes in our criminal justice system. Those purposes are beside the point in the context of this case. The only way to apply the contemporaneous objection and plain error rules to this case would be to cut them loose from their analytical moorings in favor of an overly literal reading of their text without a corresponding purpose -- and with a significantly negative practical result. There is no legitimate warrant for doing so. As Judge Mills of the United States District Court for the

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[21] Moreover, were the Court to find the contemporaneous objection rule applicable to this situation, it would create an unfortunately anomalous situation with respect to ineffective assistance of counsel claims under Strickland v. Washington, 466 U.S. 668 (1984). Given the state of pre-Gaudin law in ten federal judicial circuits, it would hardly have been constitutionally deficient representation by trial counsel to have failed to object to a trial judge's decision to decide the element of materiality, rather than allow the jury to do so. See generally Lockhart v. Fretwell, 506 U.S. 364 (1993). Yet applying "plain error" analysis as a consequence of trial counsel's failure to register such a contemporaneous objection, at least one circuit court of appeals has found that the failure to object has an outcome determinative effect on the resolution of post-Gaudin claims. See United States v. Ross, 1996 WL 41564 at * 7-9 (7th Cir. 2/2/96). There is no need to condone such a Catch-22 for criminal defendants when a preeminent constitutional right, such as the right to trial by jury, is at stake.

Central District of Illinois recently ruled in similar circumstances:

> Here, the law was clear in the Seventh Circuit, i.e., materiality was a question of law for the court. So how can [the defendant] be faulted for not objecting to the materiality issue at trial? What could he have possibly objected to? Since the law was clear in this circuit prior to Gaudin, [the defendant's] sole argument in support of such an objection would have been to ask the district court to overrule the 'well settled' law in the Seventh Circuit. Obviously, an argument of this nature would have been a waste of evryone's time.

United States v. Pearson, 897 F. Supp. 1147, 1149 (C.D. Ill. 1995). There is no reason to reach any different conclusion in this case. [22]

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[22] Indeed, at the time of Mr. Knoll's trial, controlling precedent not only in the Second Circuit, but in ten of the eleven federal judicial circuits dictated that the element of materiality was to be decided by the court rather than the jury. See, e.g., United States v. Jerke, 896 F. Supp. 962, 964 n. 2 (D.S.D. 1995). In addition, by the time of Mr. Knoll's trial, this Court had already denied at least one petition for a writ of certiorari raising this very issue. See Hansen v. United States, 475 U.S. 1045 (1986)(denying review of United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985)).

III

A DIRECTED VERDICT BY A TRIAL JUDGE CONSTITUTES "STRUCTURAL ERROR" UNDER SULLIVAN V. LOUISIANA WHICH CANNOT BE SUBJECTED TO "HARMLESS" ERROR REVIEW

Just over five years ago, this Court established an analytical dichotomy for determining which types of errors in trial proceedings are subject to harmless error and which are not. See Arizona v. Fulminante, 111 S. Ct. 1246 (1991). In Fulminante, the Court determined that "classic 'trial error'" would fall into the former category, while "structural defects in the constitution of the trial mechanism" would fall into the latter. Id. at 1264-1265. The Court endeavored to explain the distinction between these two categories by explaining that "structural error" would be a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 1265. [23] Although some types of errors may not be easy to "classif[y] so neatly," it appears that all members of the divided Fulminante Court agreed that a "directed verdict" by a trial judge against a criminal defendant would constitute "structural error." [24]

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[23] The Fulminante Court also noted that the "common thread" in the "trial error" category was "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 1264.

[24] See id. at 1256. In this portion of the Fulminante decision, four members of the Court (Justices White, Marshall, Blackmun and Stevens) joined in the following text:

Two years later, in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), a unanimous Court joined the following declaration in Justice Scalia's majority opinion:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural defect] sort, the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to trial by jury reflects, we have said, 'a profound judgment about the way in which law should be enforced and justice administered.' The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'

> As the majority concedes, there are other constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error. For example, a judge in a criminal trial 'is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how overwhelmingly the evidence may point in that direction.'

(Citations omitted). None of the remaining Justices took issue with this point in any of the additional opinions in the case.

Id. at 2083 (citations omitted). [25] It could hardly be clearer that the touchstone of this analysis applies just as fully to a directed verdict by a trial judge against a criminal defendant as it did to the defective reasonable doubt instruction in Sullivan. Justice Scalia himself confirmed this point, by negative implication, for the unanimous Court in Sullivan: "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal." Id. at 2082 (emphasis added).

These two recent decisions by the Court, together with its long line of previously referenced instructional error cases disclaiming the propriety of a directed verdict against the accused in a criminal case, [26] should leave no doubt about the correct result in this case. The directed verdict against petitioner below on the element of materiality is a structural error which defies analysis for prejudicial effect under principles of harmless -- or plain -- error review. See United States v. Johnson, 1995 WL 715298 at * 4 (4th Cir. 1995)(because "the jury was conclusively instructed" on

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[25] In this portion of his opinion in Sullivan, Justice Scalia cited the line of instructional error cases we have referred to in Section I of this amicus brief thereby endorsing their plain applicability to this type of issue as well. See id. at 2082-83 (citing, inter alia, Rose v. Clark, Pope v. Illinois, Yates v. Evatt and Carella v. California).

[26] See Section I, supra.

element in question, "the case before us is not subject to harmless error review"). [27]

Yet ignoring Fulminante and Sullivan, the Government apparently here -- and in a number of cases like Mr. Knoll's throughout the lower federal courts -- seizes upon Chief

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[27] Although "harmless" error analysis under Rule 52(a) and "plain" error analysis under Rule 52(b) are different, they share the common characteristic for present purposes of requiring a reviewing court to endeavor to quantitatively assess the prejudicial impact of the error in question upon the jury's decision at trial. With respect to the instant structural error, a directed verdict, that type of quantitative analysis simply cannot be conducted at all, under either rule. See United States v. Wiles, 1996 WL 707539 at * 13 (structural error not susceptible to "harmless" or "plain" error review); accord, United States v. Jerke, 896 F. Supp. at 964 (harmless error analysis cannot apply when court decided materiality element as matter of law and instructed jury not to consider it); People v. Avila, 43 Cal. Rptr. 2d 853, 862 (2d DCA 1995)("harmless error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury")(quoting Rose v. Clark, supra). In its decision in Peck v. United States, supra, issued almost exactly one year ago, and subsequently reheard en banc without an en banc decision yet, the Second Circuit also concluded that an analogous type of instructional defect at trial amounted to "structural error" that could not be remedied through appellate reference to the remaining evidence and jury findings at trial. See Peck, 1995 WL 764340 at * 6-8; compare United States v. Ballistrea, 1996 U.S. App. LEXIS 30967 at * 19-20 (2d Cir. 11/25/96)(finding an "omitted element" Gaudin claim to constitute "plain error").

Justice Rehnquist's concurring opinion in Gaudin to bolster the argument that harmless and/or plain error review might still be appropriately applied in this case. See 115 S. Ct. at 2320-22. [28] It is clear from the text of this opinion, however, that it did not reach any conclusions on either of these issues, but merely flagged them as open questions for the future. We submit, for the reasons articulated throughout this amicus brief, that in the context of this case neither of those types of appellate review can logically be applied. The error below was simple, "the wrong entity judged the defendant guilty;" [29] and there is no analysis that this or any other reviewing Court can conduct that can change the status of the entity that sat in judgment on the defendant to that required by the Constitution. Accord, California v. Roy, 1996 WL 633365 at * 3 (concurring opinion by Justice Scalia, joined by Justice Ginsburg). [30]

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[28] In this concurring opinion, in which Justices O'Connor and Breyer joined, Chief Justice Rehnquist noted, inter alia, that "the Government has not argued here that the error in this case was either harmless or not plain," (id. at 2321), and then went on to describe each of these potential categories of error in the Gaudin context.

[29] Sullivan v. Louisiana, 113 S. Ct. at 2082 (quoting Rose v. Clark, 478 U.S. at 578). As Justice Scalia found in Sullivan, the Sixth Amendment "requires an actual jury finding of guilty." Id. (emphasis added).

[30] It is Mr. Knoll's alternative position that this case, and his, present the type of situation contemplated by this Court in the leading "plain error" case of United States v. Olano, 113 S. Ct. 1770 (1993), when it noted that "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's

CONCLUSION

For the foregoing reasons, together with those asserted by the petitioner, this Court should rule that: 1) a trial judge can never direct a verdict against a criminal defendant on any element of the offense with which he is charged no matter how overwhelming the evidence with respect to that element might appear to be; 2) an error that is unobjected to at trial because it was consistent with established and existing law should be reviewed on appeal under Rule 52(a) of the Federal Rules of Criminal Procedure; and 3) a directed verdict by a trial judge constitutes "structural error" under Sullivan v. Louisiana which cannot be subjected to "harmless" error review.

Respectfully submitted,

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December 30, 1996

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innocence." (Emphasis added). Allowing a trial judge to override a defendant's constitutional right to trial by jury by directing a verdict against him certainly undermines both the "integrity" and the "public reputation" of such a proceeding.

(6)

No. 96-203

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOYCE B. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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33 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Rules

Miscellaneous

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers (NACDL) submits this brief as *amicus curiae* in support of the petitioner. Letters from the parties to this case expressing their consent to the filing of this brief are on file with the Clerk.

INTEREST OF *AMICUS*

NACDL is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. NACDL is recognized by the American Bar Association as an affiliate organization, and has full representation in the ABA's House of Delegates. As part of

its mission, NACDL strives to the defend individual liberties guaranteed by the Bill of Rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two important and recurring questions regarding direct appeals of criminal convictions. First, what is the appropriate standard of review of an action by the district court to which the defendant did not object at trial, where an objection would have been futile under then-existing circuit precedent, but a later decision makes it clear that the district court erred? Second, under what circumstances should a criminal conviction be reversed where the jury was prevented from considering an essential element of the charge?

1. The first issue requires the Court to decide whether to apply Fed. R. Crim. P. 52(a) (the ordinary harmless-error standard) or Rule 52(b) (the plain-error standard). The plain-error standard differs in three respects: First, under Rule 52(b) only clear and obvious errors may be corrected; there is no similar restriction under 52(a). Second, under Rule 52(a) the burden is on the government to prove that the error was harmless, while under Rule 52(b) the defendant must prove that it was harmful. Third, reversal is mandatory under Rule 52(a) but discretionary under Rule 52(b).[1] Ordinarily, the plain-error standard applies when the defendant seeks to raise an issue for the first time on appeal.

But when an objection at trial would obviously have been futile because it was foreclosed by well settled circuit precedent, the policies underlying the plain-error rule (and the closely related contemporaneous-objection rule) are not implicated. In such a case the defendant's failure to object is excused, and review should proceed under Rule 52(a) as if the objection had been made and overruled. Alternatively, if the plain-error standard applies, the Court should hold that the obviousness of the error must be assessed in light

[1]*United States v. Olano*, 113 S. Ct. 1770, 1776-79 (1993).

of the law at the time of the appeal. In addition, the plain-error rule's strictures should be loosened in cases like this one, because the defendant's failure to object was justified in light of the law at the time of trial.

2. The second question is how to determine whether an error that prevents the jury from considering an essential element of the crime affects the defendant's substantial rights. The Eleventh Circuit held the error to be harmless because it found the government's evidence to be overwhelming. But that kind of appellate fact-finding violates the Sixth Amendment. Unless a defendant consents to a bench trial, a conviction must be based on a finding of guilt by the jury, not by the trial judge or by the court of appeals. If the jury is prevented from making a finding on an essential element of the charge, the error is harmful —and the conviction must ordinarily be reversed—even though the court of appeals may believe that the defendant is obviously guilty and that he would have been convicted even under the proper instructions. And that conclusion holds true under both the plain-error standard and the harmless-error standard.

ARGUMENT

I.

Where the district court's action was correct under then-prevailing law, but erroneous under current law, the defendant's failure to have made a futile objection should not affect the standard of review.

1. The district court in this case decided the issue of materiality as a matter of law rather than letting the jury decide it. Because that was proper under the then-prevailing rule in the Eleventh Circuit (and in most of the other circuits as well),[2] any objection to the district court's

[2]*E.g., United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (Kozinski, J., dissenting)(collecting cases), *aff'd*, 115 S. Ct. 2310

action would have been futile. Consequently, Johnson did not object. But this Court's subsequent decision in *United States v. Gaudin* makes it clear that the district court's action was wrong.[3] Under *Griffith v. Kentucky*, Gaudin applies here retroactively, because this case was pending on direct appeal when *Gaudin* was decided.[4] This case therefore raises the question of how the *Griffith* principle should be applied where the defendant did not object at trial because an objection would have been futile. Specifically, should the error in such cases be reviewed differently than in a case where the defendant did object at trial?

Consideration of the purposes underlying the contemporaneous-objection rule suggests that the two kinds of cases should be treated the same. Ordinarily a defendant must object at trial in order to preserve an error for appeal because the objection gives the trial court a chance to correct the error, thereby obviating the need for an appeal.[5] But that policy does not apply where the objection would be futile under prevailing caselaw.[6] In that event, an objection would not prevent the trial court from committing the error. Moreover, there is little risk of "sandbagging" in such a case. The defendant is unlikely to deliberately withhold an objection in order to manufacture an appealable error, since he will have no reason to think that the objection would ultimately succeed on appeal.

If in these circumstances the error is reviewable only under a stricter-than-usual standard (or *a fortiori* if it is not reviewable at all), the defendant will be penalized for having failed to predict the future. That is not only unfair, but it makes for a bad rule of judicial administration.

(1995).

[3]*United States v. Gaudin*, 115 S. Ct. 2310 (1995).

[4]*See Griffith v. Kentucky*, 479 U.S. 314 (1987).

[5]*See, e.g., Estelle v. Williams*, 425 U.S. 501, 508 n.3 (1976).

[6]*See, e.g., Reed v. Ross*, 468 U.S. 1, 15 (1984).

Consider the consequences of a rule that requires defendants to pay a cost for failing to raise a futile objection: Defense counsel will have an incentive to raise objections that are frivolous under then-existing law, but that might conceivably be recognized at some point in the future.[7] That would waste time and disrupt the flow of the proceedings.

It would also present defense counsel with a Hobson's choice: The only way to fully protect the record for appeal would be to raise objections that will undoubtedly be denied. But a lawyer who continually makes frivolous objections runs the risk of losing credibility in the trial court, like the boy who cried "Wolf." When counsel finally raises a meritorious objection, he may be ignored. Therefore it is usually best to object only if the objection has a reasonable chance of succeeding.[8] Counsel should be able to follow that course without fear that they are inadequately protecting their clients' appeal rights.

This commonsense conclusion is supported by two alternative lines of doctrinal analysis. The first draws on the general proposition that "[t]he law does not require the doing of a futile act."[9] For example, where a right to seek judicial relief is conditioned on first exhausting an administrative, contractual, or other remedy (a requirement having obvious parallels to the contemporaneous-objection rule), a failure to exhaust is excused if any attempt to pursue the remedy would have been futile.[10] More

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[7]*Id.* at 15-16.

[8]*See, e.g.*, 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 52 at 209-10 (4th ed. 1992)(Practitioner's ed.).

[9]*Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

[10]*See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 148 (1992); *Honig v. Doe*, 484 U.S. 305, 326-27 (1988); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324, 330-31 (1969); *Schultz v. Owens-Illinois Inc.*, 696 F.2d 505, 511-12 (7th Cir. 1982).

broadly, the performance of a condition precedent to the creation or the exercise of a legal right can be excused if it would require a futile act.[11] Under this principle, this case should not be treated as one where the defendant has forfeited a right by having failed to raise it, but rather as one where the failure to object is excused. Thus, the case should be decided as if an objection had been made and overruled (*i.e.*, under Fed. R. Crim. P. 52(a)) rather than under the plain-error rule.[12]

Alternatively, much the same result can be reached within the confines of the plain-error rule. In cases such as this one, where there has been a posttrial change in the controlling law, the trial court's action should be regarded as a "plain" error if it is obviously wrong in view of the law at the time of the appeal. (This is the rule followed in one form or another by at least eight of the circuits.[13])

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[11]*See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-67 (1977)(employment discrimination); *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1275 (7th Cir. 1996)(contracts); *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991) (contracts); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1450-52 (4th Cir. 1990)(housing discrimination).

[12]This is the approach followed by the *en banc* Ninth Circuit in *United States v. Keys*, 95 F.3d 874, 877-80 (9th Cir. 1996)(*en banc*). *Accord United States v. McGuire*, 79 F.3d 1396, 1406-13 (5th Cir.)(Weiner, J., concurring), *on reh'g en banc*, 99 F.3d 671 (5th Cir. 1996). The Tenth Circuit has also held that the plain-error rule does not apply to the kind of error at issue here, although it reached that conclusion by a different analytical route. *United States v. Wiles*, No. 94-1592, U.S. App. LEXIS 31853 at *25-49 (10th Cir. Dec. 10, 1996)(*en banc*).

[13]*See, e.g., United States v. Randazzo*, 80 F.3d 623, 630-32 (1st Cir. 1996); *United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995); *United States v. Retos*, 25 F.3d 1220, 1230 (3d Cir. 1994); *United States v. David*, 83 F.3d 638, 644-46 (4th Cir. 1996); *United States v. Bencs*, 28 F.3d 555, 564 (6th Cir. 1994),

Moreover, the language of Rule 52(b) is sufficiently open-ended to permit the Court to hold as a matter of supervisory authority[14] that in such cases the rigors of the plain-error rule should be relaxed. The Second Circuit has in effect adopted this approach by holding that in cases involving posttrial changes in the law, the burden of persuasion on the issue of prejudice under Rule 52(b) shifts to the government.[15] That conclusion is eminently sensible. In addition, it would be appropriate for the Court to hold that although reversal under Rule 52(b) is discretionary,[16] in supervening-decision cases such as this one there should be a presumption (if not a flat rule) in favor of reversal.[17]

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cert. denied, 115 S. Ct. 915 (1995); *United States v. Holmes*, 93 F.3d 289, 292-93 (7th Cir. 1996); *United States v. Baumgardner*, 85 F.3d 1305, 1308-09 (8th Cir. 1996); *United States v. Kramer*, 73 F.3d 1067, 1074 n.16 (11th Cir.), *cert. denied*, 136 L. Ed. 2d 405 (1996).

Although the D.C. Circuit has held that under Rule 52(b) the error must have been obvious at the time of the trial, it follows a "supervening-decision doctrine" under which the defendant's failure to object at trial is excused if an objection would have seemed futile under then-existing law but the law has subsequently changed in the defendant's favor. *E.g., United States v. Smart*, 98 F.3d 1379, 1393 (D.C. Cir. 1996); *United States v. Washington*, 12 F.3d 1128, 1138 (D.C. Cir.), *cert. denied*, 115 S. Ct. 98 (1994). It is unclear whether the D.C. Circuit's analysis operates within Rule 52(b) or independently of Rule 52(b). *See McGuire*, 79 F.3d at 1410 (Wiener, J., concurring).

[14]*See, e.g., Thomas v. Arn*, 474 U.S. 140, 146-48 (1985).

[15]*United States v. Ballistrea*, No. 95-1578, 1996 U.S. App. LEXIS 30967 at *19-20 (2d Cir. Nov. 25, 1996); *Viola*, 35 F.3d at 41-42.

[16]*Olano*, 113 S. Ct. at 1778-79; *see also* pp. 23-25, *infra*.

[17]*Cf. Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1209 n.23 (1993)(discretion may be limited by the adoption of "generally applicable rules to cover recurring situations"). *See also* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 771-73 (1982).

2. It follows from what we have said that in cases such as this, the doctrine of "invited error" is inapposite. Under the invited-error rule, a defendant may not challenge an action that the district court took at the defendant's request.[18] The rule is ordinarily a reasonable safeguard against a defendant's attempt to engage in tactical gamesmanship. But that rationale does not apply when there has been a posttrial change in the controlling law. Defense counsel cannot be faulted for making tactical decisions in reliance on the state of the law at the time of trial. That is what lawyers are supposed to do. If counsel relies in good faith on what reasonably appears to be the controlling law, the defendant should not lose the ability to rely on subsequent legal changes.

II.

A jury-instruction error affects the defendant's substantial rights if it prevents the jury from making a finding on an essential element of the charge.

We come now to the issue on which the Eleventh Circuit's decision turned: whether the district court's error affected Johnson's substantial rights. The court held that her substantial rights were not affected because it found "overwhelming evidence" that her statements to the grand jury were material. The court therefore thought that she would still have been convicted even under the proper instructions.[19]

This ruling was wrong because in a case such as this, where the jury is prevented from considering every element of the charge, a court of appeals may not weigh the evidence to decide for itself whether the defendant is guilty.

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[18]*See, e.g., United States v. Johnson*, 26 F.3d 669, 677 (7th Cir.), *cert. denied*, 115 S. Ct. 344 (1994); *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir.), *cert. denied*, 510 U.S. 951 (1993); *United States v. Ahmad*, 974 F.2d 1163, 1165 (9th Cir. 1992).

[19]Pet. App. 9a.

Nor may the court speculate as to what the jury would have done had it been properly instructed. Both of those inquiries invade the decision-making function that the Sixth Amendment assigns exclusively to the jury. As we will show, a defendant's substantial rights are infringed any time the jury is permitted to convict without finding that the government has proved every element of the crime beyond a reasonable doubt.[20]

A. The Court's decision here will apply to both the harmless-error and plain-error standards, and to a variety of jury-instruction errors.

Even if the Court holds that this case is governed by the plain-error standard, the impact of its decision here will not be limited to cases decided under that standard. Nor will it be limited to those where the trial court expressly decides an essential element of the charge as a matter of law. Rather, the decision will apply equally to cases where the defendant did object to the trial court's action and to cases involving a variety of jury-instruction errors.

1. The "substantial rights" analysis under Rule 52(b) is (with one exception) identical to ordinary harmless-error analysis under Rule 52(a).[21] The relevant language of the two provisions is identical: Rule 52(a) defines a harmless error as one that does not "affect substantial rights," while Rule 52(b) refers to plain errors "affecting substantial rights." A term that appears in different parts of the same rule or statute is presumed to mean the same thing each

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[20]Notably, the Eleventh Circuit seems to have recognized that the approach it followed below is improper: After the petition for *certiorari* was filed in this case, the court decided *United States v. Rogers*, 94 F.3d 1519, 1524-26 (11th Cir. 1996), which follows an analysis similar to what we advocate here.

[21]*Olano*, 113 S. Ct. at 1777-78.

time it appears.[22] Thus, the method for determining whether a defendant's substantial rights have been violated is the same whether or not the defendant objected at trial. The only difference between Rule 52(a) and Rule 52(b) is that under Rule 52(a) the government has the burden of proving that the error was harmless, while under Rule 52(b) the defendant must prove that the error was harm*ful*.[23]

This means that the Court's ruling about substantial-rights analysis cannot be restricted to the plain-error standard, but will necessarily extend to ordinary harmless-error cases. If the plain-error standard permits courts of appeals weigh the evidence in cases where the jury was prevented from considering element of the charge, then such appellate fact-finding will be permissible in harmless-error cases as well. Conversely, if appellate fact-finding in such cases is improper under Rule 52(a), it is equally improper under Rule 52(b). Therefore, references in this brief to harmless error or harmful error encompass both halves of Rule 52.

2. Nor are issues raised here unique to cases where the trial judge finds as a matter of law that the government has proven an element of the charge. Rather, they arise in any case where the jury is permitted to convict the defendant without finding every element of the charge to have been proved beyond a reasonable doubt.

A criminal defendant is entitled under the Sixth Amendment to have findings on all elements of the charge made by the jury.[24] That right is of course violated if the trial judge expressly takes an issue away from the jury and decides it as a matter of law—what has come to be known as "*Gaudin* error." But that is merely the most blatant way in which the defendant's Sixth-Amendment rights can be

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[22]*E.g.*, *Commissioner v. Lundy*, 116 S. Ct. 647, 655 (1996); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995).

[23]*See Olano*, 113 S. Ct. at 1777-78.

[24]*Gaudin*, 115 S. Ct. at 2313-16.

violated, not the only way. The defendant's rights can be violated just as effectively by various other kinds of errors: an instruction that the government is not required to prove an essential element of the charge;[25] an instruction that omits an essential element;[26] an instruction that seriously misdescribes an element;[27] or (in some cases) an instruction that directs the jury to apply an unconstitutional presumption.[28] These errors all permit the jury to convict without finding that every element of the charge has been proved. And if the instructions do not require the jury to find every element, a reviewing court must assume that the jury did not find every element.

Where a jury returns a general verdict, the jurors' deliberations may not be probed in order to examine the findings on which the verdict is based. The only way to determine what facts the jury found is by looking at the instructions, to see what the jury was told to decide.[29] Since juries are presumed to follow their instructions, a verdict of guilty represents a finding of whatever facts the jury was told were necessary to support a conviction. But it represents a finding of those facts only. If the jury was not told to decide a particular issue, an appellate court may not conclude that it undertook to decide the issue *sua sponte*.

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[25]*E.g.*, *United States v. Aramony*, 88 F.3d 1369, 1385-87 (4th Cir. 1996).

[26]*E.g.*, *Wiles*, 1996 U.S. App. LEXIS 31853 at *25-49; *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996); *United States v. Gallerani*, 68 F.3d 611, 617-19 (2d Cir. 1995).

[27]*E.g.*, *United States v. Aguilar*, 80 F.3d 329, 330-34 (9th Cir. 1996)(*en banc*); *Peck v. United States*, 73 F.3d 1220, 1223-24, 1227-28 (2d Cir. 1995).

[28]*See, e.g.*, *Yates v. Evatt*, 500 U.S. 391 (1991); *Carella v. California*, 491 U.S. 263 (1991); *id.* at 267-73 (Scalia, J., concurring in the judgment).

[29]*See generally Yates*, 500 U.S. at 404.

Jurors presumably do not make unnecessary work for themselves by deciding issues not identified by the instructions.[30] Moreover, jurors "are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law[.]"[31] Indeed, they are typically told that they are duty-bound to follow the judge's instructions on the law.[32] Therefore, "[w]hen . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."[33]

So if the jury is not told about element *X* (or if it is told that the government need not prove *X* or that the government may prove *Y* instead), the case may differ in form from one involving pure *Gaudin* error, but in substance it is identical. In both kinds of cases, the defendant is convicted without a proper determination of guilt by the jury. Our discussion in this brief therefore refers both to *Gaudin* error and to the other kinds of instructional error that we have mentioned. For want of a better term, we refer to all of these as "elemental" errors, since they all relate to the elements of the crime.

B. The appellate court may not weigh the evidence to decide whether the defendant is guilty or whether he would have been convicted even under the proper instructions.

1. Johnson's conviction was affirmed because the Eleventh Circuit found "overwhelming evidence" that

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[30]*See, e.g., Yates v. Evatt*, 500 U.S. at 406 n.10; *Sandstrom v. Montana*, 442 U.S. 510, 526 n.13 (1979).

[31]*Griffin v. United States*, 502 U.S. 46, 59 (1991).

[32]*See, e.g.*, 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS § 12.01 (4th ed. 1992).

[33]*Griffin*, 502 U.S. at 59. *Cf. Yates*, 500 U.S. at 406 n.10; *Sandstrom v. Montana*, 442 U.S. 510, 526 n.13 (1979).

Johnson's statements were material and concluded that no reasonable juror could have found otherwise. Whether it is appropriate for a court of appeals to weigh the evidence in this manner in the guise of harmless-error analysis has been much debated over the years.[34] We assume for the sake of discussion that this kind of appellate fact-finding is appropriate for many kinds of errors.[35] But that does not dispose of this case. Elemental errors are different in kind from most other errors, and they demand a different approach to the question of harmless error.[36]

The notion that an appellate court may consider the weight of the evidence in conducting its harmless-error analysis is based on the assumption that the jury has actually found every fact necessary to support the conviction.[37] Where that assumption holds true, the question is whether the facially sufficient jury verdict was tainted by error. But the assumption does not hold true in

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[34]*See, e.g.*, 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 32.4d (2d ed. 1994); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 17-25 (1970); Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1185-99 (1995)[cited hereafter as Edwards, *To Err is Human*]; Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994).

[35]*See, e.g., Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972); *Schneble v. Florida*, 405 U.S. 427, 430-32 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969). *But see, e.g.*, THE RIDDLE OF HARMLESS ERROR 17-22 (criticizing this approach); Edwards, *To Err Is Human*, 70 N.Y.U. L. REV. at 1192-99 (same).

[36]*See, e.g., Carella*, 491 U.S. at 267 (Scalia, J. concurring in the judgment)(harmless-error analysis applicable to mandatory conclusive presumptions "is wholly unlike the typical form of such analysis").

[37]*Cf. Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081-82 (1993); *Yates*, 500 U.S. at 405-06 & n.10.

cases involving elemental error. In such cases, the jury has not found the defendant guilty of every element of the crime beyond a reasonable doubt, and therefore has not rendered a "verdict within the meaning of the Sixth Amendment" at all.[38] Consequently, the premise of ordinary harmless-error analysis is absent. If there has been no verdict that the defendant is guilty of every element beyond a reasonable doubt, "the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent a constitutional violation is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate."[39]

Thus, this Court has held for at least fifty years that an erroneous instruction about the elements of the crime cannot be held harmless merely because the reviewing court believes that the defendant was guilty and would have been convicted even under the proper instructions.[40] For example, in *Kotteakos v. United States*, the seminal decision on harmless error, the Court explained that an appellate court should not "speculate upon probable reconviction" and that the question of harmfulness does not turn on whether "conviction would, or might probably have resulted in a properly conducted trial[.]"[41] Similarly, in *Bollenbach v. United States* the Court said that the question is not "whether guilt may be spelt out of a record," but whether guilt was properly found by the jury.[42] More recently, the Court said in *Cabana v. Bullock* that "[f]indings

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[38]*Sullivan*, 113 S. Ct. at 2082.

[39]*Id.* at 2082 (emphasis in the original).

[40]*Yates*, 500 U.S. at 402-03 n.8.

[41]*Kotteakos v. United States*, 328 U.S. 750, 763, 776 (1946).

[42]*Bollenbach v. United States*, 326 U.S. 607, 614 (1946); *see also id.* at 615; *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408-09, 410 (1947); *Weiler v. United States*, 323 U.S. 606, 611 (1945).

made by a judge cannot cure deficiencies in the jury's finding . . . resulting from the court's failure to instruct it to find an element of the crime."[43]

The basis for this rule is simple. A judge may never direct a verdict of conviction, even if the government's case is overwhelming.[44] Such an error can never be harmless because "the wrong entity judged the defendant guilty."[45] An instruction that prevents the jury from considering every element of the crime is in effect a partial directed verdict, because—like a directed verdict—it prevents the jury from performing its constitutionally mandated function.[46] Appellate speculation about what the jury might have done under the proper instructions doesn't remedy the trial court's error, it compounds it. Indeed, due process prohibits a court of appeals from affirming a conviction based on a legal theory that was not submitted to the jury.[47]

The Court's most recent discussion of the harmful-error analysis applicable to jury instructions is *Sullivan v. Louisiana*. The Court explained there that the Sixth Amendment "requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts

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[43]*Cabana v. Bullock*, 474 U.S. 376, 384 (1986). *Cf. SEC v. Chenery*, 318 U.S. 80, 88 (1943).

[44]*E.g., Sullivan*, 113 S. Ct. at 2080; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Brotherhood of Carpenters*, 330 U.S. at 408, 410.

[45]*Rose v. Clark*, 478 U.S. 570, 578 (1986). *See also Henderson v. Morgan*, 426 U.S. 637, 650 (1976)(White, J., concurring)(denial of jury trial on "one or all" elements of the crime cannot be harmless error).

[46]*See, e.g., United Brotherhood of Carpenters*, 330 U.S. at 408-09, 410; *Carella*, 491 U.S. at 268-69 (Scalia, J., concurring in the judgment).

[47]*Presnell v. Georgia*, 439 U.S. 14 (1978)

for the State would be sustainable on appeal[.]"[48] Because "[h]armless-error review looks . . . to the basis on which the jury actually rested its verdict[,]" an appellate court may not "hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be[.]"[49]

Although *Sullivan* dealt with an unconstitutional reasonable-doubt instruction, its condemnation of "appellate speculation" applies equally to elemental errors.[50] The Court relied heavily on cases regarding erroneous instructions about elements of the crime,[51] and it has subsequently described *Sullivan* as holding that convictions must "rest upon a jury determination that the defendant is guilty *of every element* of the crime . . . beyond a reasonable doubt."[52] Moreover, as the Court has noted, a verdict based on the wrong rule of substantive law "is not

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[48]113 S. Ct. at 2082.

[49]113 S. Ct. at 2081 (emphasis in the original; internal quotes and citation omitted).

[50]For court-of-appeals decisions reaching this conclusion, see, *e.g.*, *Wiles*, 1996 U.S. App. LEXIS 31853 at *42-43; *Waldemer v. United States*, 98 F.3d 306, 308-09 (7th Cir. 1996); *United States v. Aguilar*, 80 F.3d 329, 333 (9th Cir. 1996)(en banc); *United States v. DiRico*, 78 F.3d 732, 736-37 (1st Cir. 1996); *Pettigrew*, 77 F.3d at 1511; *Peck v. United States*, 73 F.3d 1220, 1227-28 (2d Cir. 1995); *United States v. Forbes*, 64 F.3d 928, 934-35 (4th Cir. 1995). *Cf.* Edwards, *To Err is Human*, 70 N.Y.U. L. REV. at 1200-01 (reading *Sullivan* as being broadly applicable to harmless-error analysis in general). *But see United States v. Kleinbart*, 27 F.3d 586, 590 (D.C. Cir.) (dictum), *cert. denied*, 115 S. Ct. 456 (1994).

[51]113 S. Ct. at 2081-82 (citing *Yates*, 111 S. Ct. at 1893; *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment); *Rose*, 478 U.S. at 578; *id.* at 593 (Blackmun, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509-10 (1987)(Stevens, J., dissenting); and *Bollenbach*, 326 U.S. at 614).

[52]*Gaudin*, 115 S. Ct. at 2313 (emphasis added).

materially different" from one based on an improper standard of proof.[53] If a conviction must be reversed when the jury finds all the elements of the crime but applies the wrong standard of proof, then it must also be reversed when the jury does not find whether an essential element was proved at all, by any standard of proof.

Thus, in his concurring opinion in *California v. Roy*, Justice Scalia (joined by Justice Ginsburg) applied the *Sullivan* analysis to an instruction that incorrectly described the *mens rea* necessary to support a conviction—an elemental error.[54] Justice Scalia noted that because of the error, the jury had not found the defendant guilty of every element of the crime. He went on to explain that the error was not harmless even though the defendant would undoubtedly have been convicted even under the proper instructions: "To allow the error to be cured in that fashion would be to dispense with trial by jury."[55]

The operation of the proper approach to harmless error is illustrated by *McNally v. United States* and *Chiarella v. United States*.[56] In each of these cases, the Court held that the defendant had been convicted on an improper legal theory. And in each case the government argued as a fallback position that the evidence supported conviction even under the correct legal standard—*i.e.*, that the error was harmless. But the Court refused to weigh the evidence or speculate about what might have happened had the jury been properly instructed. In *McNally* the Court noted simply that "there was nothing in the jury charge that

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[53]*United Brotherhood of Carpenters*, 330 U.S. at 410.

[54]*California v. Roy*, 117 S. Ct. 337, 339-40 (1996)(Scalia, J., concurring).

[55]*Id.* at 339.

[56]*McNally v. United States*, 483 U.S. 350 (1987); *Chiarella v. United States*, 445 U.S. 222 (1980).

required [the necessary] finding."[57] And in *Chiarella* the Court explained that "we cannot affirm a criminal conviction on the basis of a theory not presented to the jury[.]"[58]

2. Although three of this Court's decisions concerning elemental error contain language consistent with the Eleventh Circuit's holding in this case, that language does not affect our analysis. The language in two of the cases does not accurately reflect the current state of the law, and the language in the third is inapplicable to cases on direct appeal as opposed to collateral review.

(a) In *Rose v. Clark*, the Court stated that if the jury is instructed to apply an unconstitutional conclusive presumption, the error is harmless "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt[.]"[59] But in *Yates v. Evatt* the Court expressly disapproved that language.[60] As *Yates* explains, it is inappropriate for an appellate court to consider the weight of the evidence where the instructions prevent the jury from considering all the evidence.[61] Moreover, the holding in *Rose* was premised on the fact that presumptions generally leave the jury free to decide whether every required element has been proved. A presumption is triggered by predicate facts that must themselves be proved beyond a reasonable doubt; frequently the predicate facts are so closely related to the ultimate fact to be presumed that a finding of the predicate

[57] *McNally*, 483 U.S. at 361.

[58] *Chiarella*, 445 U.S. at 236.

[59] *Rose*, 478 U.S. at 579.

[60] *Yates*, 500 U.S. at 402-03 n.8.

[61] *Id.* at 405-06 & n. 10.

facts is equivalent to a finding of the ultimate fact.[62] In that event, the presumption does not prevent the jury from making the required findings.

(b) The Court also seemed to endorse speculation about what a properly instructed jury would have done in *Pope v. Illinois*. *Pope* was an obscenity case where the jury had been incorrectly instructed on how to decide the question of redeeming social value.[63] The majority opinion said that the error was harmless if a rational juror could not find such value even under the correct legal standard, and that a conviction may be affirmed even if the jury was not required to find every element of the crime under the proper standard of proof.[64] But those statements have no precedential weight, for two reasons.

First, it is apparent in hindsight that a majority of the Court disagreed with them. The four dissenting Justices argued that an instruction misstating an element of the crime can never be harmless, and that an appellate court "is not free to decide in a criminal case that, if asked, a jury *would* have found something that it did not find."[65] Although Justice Scalia joined the majority opinion, he filed a separate opinion explaining that he concurred only because he thought that the finding required by the erroneous instructions was no different in substance than what the correct instructions would have required.[66] Subsequent opinions have made it clear that he agreed with

[62] *Rose*, 478 U.S. at 580 n.8, 580-81; *see also Sullivan*, 113 S. Ct. at 2084 (Rehnquist, C.J., concurring)(error in *Rose* did not "remove[] an element of the offense from the jury's consideration"); *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment).

[63] *Pope v. Illinois*, 481 U.S. 497 (1987).

[64] *Id.* at 504 & n.7.

[65] *Id.* at 508, 509-10 (Stevens, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting)(emphasis in the original).

[66] *Id.* at 504 (Scalia, J., concurring).

the dissenters' approach to harmless error.[67] Thus, what seems to be a majority opinion on this point really isn't.

Second, *Pope*'s harmless-error analysis has in any event been abandoned by the Court's subsequent decisions. It has been cited only once in an opinion of the Court: in *Arizona v. Fulminante*, where it was one of 17 cases included in a string-cite supporting a statement that most constitutional errors are subject to harmless-error analysis.[68] But none of the Court's post-*Pope* decisions dealing with erroneous jury instructions (most notably, *Carella*, *Yates*, and *Sullivan*) has cited the *Pope* "majority" opinion. Rather, the Court has relied on the harmless-error analysis advanced by the *dissenters* in *Pope*.[69]

(c) Finally, in *United States v. Frady* the Court held that an elemental error was not prejudicial, in part because the evidence of the defendant's guilt was overwhelming.[70] But *Frady* reached the Court as a proceeding under 28 U.S.C. § 2555 seeking collateral review of a conviction that had become final 17 years earlier. It was decided under the cause-and-prejudice standard, which is substantially harder for a defendant to satisfy than the plain-error standard.[71] Thus, the Court's seeming approval of the "overwhelming

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[67] *Roy*, 117 S. Ct. at 339-40 (Scalia, J., concurring); *Sullivan*, 113 S. Ct. at 2080-82; *Yates*, 500 U.S. at 413-14 (Scalia, J., concurring in part and concurring in the judgment); *Carella*, 491 U.S. at 267-73 (Scalia, J., concurring in the judgment).

[68] *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991).

[69] *Sullivan*, 113 S. Ct. at 2082 (citing *Pope*, 481 U.S. at 509-10 (Stevens, J., dissenting)).

[70] *United States v. Frady*, 456 U.S. 152, 171-72 (1982).

[71] *Id.* at 165, 166. *See also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

evidence" approach in the context of collateral review is not controlling in cases arising on direct appeal.[72]

3. We do not contend that elemental errors can never be harmless. To be sure, elemental errors usually affect the verdict, and are ordinarily grounds for reversal.[73] But there are a few narrow circumstances under which an appellate court can conclude that the error had no effect on the verdict and therefore was harmless.

First, the record may demonstrate that despite the erroneous instruction the jury in fact made all the necessary findings. For example, if the jury returned a special verdict or a general verdict accompanied by answers to special interrogatories, the jury's answers will indicate what specific facts it found.[74] Such cases will be rare, though, because general verdicts are preferred in criminal cases.[75] More common are cases where the instructions dealing with a different count require the jury to make the finding at issue.[76] Second, an instruction to apply an unconstitutional mandatory presumption can be harmless if the predicate facts that trigger the presumption are so closely related to

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[72] Moreover, the result in *Frady* would have been the same under any standard of review, because the erroneous instruction did not prevent the jury from making all the findings necessary to support the conviction. *See Frady*, 456 U.S. at 172-74; *see also* n. 77, *infra* & accompanying text.

[73] *See* TRAYNOR, THE RIDDLE OF HARMLESS ERROR 73-74.

[74] *See, e.g., United States v. Edmond*, 52 F.3d 1080, 1107 (D.C. Cir.), *cert. denied*, 116 S. Ct. 539 (1995); *United States v. Mitchell*, 49 F.3d 769, 781 (D.C. Cir.), *cert. denied*, 116 S. Ct. 327 (1995).

[75] *See, e.g., United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969).

[76] *See, e.g., Roy*, 117 S. Ct. at 339-40, (Scalia, J., concurring); *Forbes*, 64 F.3d at 934-35; *United States v. Whitmore*, 24 F.3d 32, 35 (9th Cir. 1994). *Cf. Frady*, 456 U.S. at 172-74 (erroneous instruction on malice as element of murder was not prejudicial where jury's finding of premeditation necessarily entailed a finding of malice).

the presumed fact that they are functionally equivalent to it.[77] In that event, the jury's finding that the predicate facts were proved necessarily amounts to a finding that the ultimate fact was proved as well. Third, the error may be harmless if the erroneous instruction related solely to a count on which the defendant was acquitted.[78] Finally, the error may be harmless if the defendant expressly conceded the element in question, thereby waiving the right to have the jury decide that issue.[79] But the concession must be clear and explicit, and not simply a tactical decision not to dispute the government's evidence on a particular point.[80]

Because an elemental error can be harmless in one of these special circumstances, it would not be appropriate to classify the broad category of elemental errors as "structural" errors.[81] But that label is appropriate if one focuses on the subclass of elemental errors that are harmful (*i.e.*, to cases involving none of the circumstances discussed in the previous paragraph). The Court held in *Sullivan* that "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt . . . unquestionably qualifies as structural error."[82] As we have explained, a conviction without a jury determination on every element of the crime is no different than the conviction in *Sullivan*: In both cases the defendant

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[77]*See, e.g., Roy*, 117 S. Ct. at 339-40 (Scalia, J., concurring); *Sullivan*, 113 S. Ct. at 2082; *Carella*, 491 U.S at 267; *id.* at 271 (Scalia, J., concurring in the judgment); *Rose*, 478 U.S. at 580-81.

[78]*See Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment); *United States v. McGuire*, 99 F.3d 671 (5th Cir. 1996)(en banc).

[79]*See Carella*, 491 U.S. at 270 (Scalia, J, concurring in the judgment); *United States v. Melina*, No. 95-1802, 1996 U.S. App. LEXIS 30900 at *10-13 (8th Cir. Nov. 29, 1996).

[80]*See Estelle v. McGuire*, 502 U.S. 62, 69 (1991).

[81]*See Roy*, 117 S. Ct. at 339; *Fulminante*, 499 U.S. at 306-07.

[82]113 S. Ct. at 2083 (internal quotation marks omitted).

was denied the kind of jury verdict that the Sixth Amendment requires.[83] Consequently, *Sullivan*'s holding on the structural-error question applies to harmful elemental errors as well.[84]

III.

If the jury did not find the defendant guilty of every element of the crime beyond a reasonable doubt, the error seriously affected the fairness and integrity of the trial.

If the Court holds that this case is governed by the plain-error standard, one issue remains. Under *Olano*, the court of appeals is authorized to reverse a plain error that affected the defendant's substantial rights, but the decision whether or not to reverse is discretionary.[85] Reversal is appropriate if the defendant is actually innocent or if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[86] The Court need not concern itself here with cases falling within the "innocence" category, which are for obvious reasons intensely fact-bound. But this case presents the Court with an opportunity to provide the courts of appeals with some much-needed guidance regarding the circumstances in which an error seriously affects the fairness, integrity, or reputation of judicial proceedings.

Some of the courts of appeals have held that convictions should be affirmed under this prong of the *Olano* standard if the defendant would still have been convicted under the

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[83]*See* pages 16-17, *supra*.

[84]*See Wiles*, 1996 U.S. App. LEXIS 31853 at *25-49.

[85]*Olano*, 113 S. Ct. at 1778.

[86]*Id.* at 1779 (internal quotation marks and citation omitted).

proper instructions.[87] In doing so, those courts ignore *Olano*'s statement that "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."[88] More seriously, they engage in precisely the kind of appellate fact-finding and speculation that the Sixth Amendment forbids, only they do it under the rubric of "discretion" rather than as an aspect of harmful-error analysis. But the demands of the Sixth Amendment do not vary depending on the label that a court uses to describe what it is doing. If the jury has not made all the findings necessary to support a conviction, the appellate court may not fill in the gap, period.

A harmful elemental error satisfies the *Olano* standard because it necessarily has a serious effect on the trial's fairness and integrity. The right to a jury trial in a criminal case "reflects a profound judgment about the way in which law should be enforced and justice administered."[89] And as the Court said in *Sullivan*, the requirement that a finding of guilt be made *by the jury* is "the most important element" of the jury-trial guarantee.[90] Thus, a proper jury verdict is an indispensable condition precedent to the entry of a judgment of conviction; as we have shown, its absence is a structural defect in the trial process. Without a proper jury verdict, the trial judge has no more authority to enter a judgment of conviction than would the court reporter.[91]

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[87]*E.g.*, *United States v. Ross*, 77 F.3d 1525, 1540-41 (7th Cir. 1996); *United States v. Allen*, 76 F.3d 1348, 1368 (5th Cir.), *cert. denied*, 117 S. Ct. 121 (1996).

[88]*Olano*, 113 S. Ct. at 1779.

[89]*Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

[90]113 S. Ct. at 2080.

[91]For circuit-court decisions holding that harmful elemental errors by definition satisfy the *Olano* serious-effect standard, see *United States v. Baumgardner*, 85 F.3d 1305, 1310 (8th Cir. 1996);

Our analysis here is consistent with the fact that reversal under Rule 52(b) is discretionary. Discretionary decisions do not invariably call for a case-by-case, fact-specific analysis: As we have noted, discretion may be channelled and limited through the adoption of "generally applicable rules to cover recurring situations."[92] To the extent that the text of Rule 52(b) does not require one result or another, this Court may announce such general rules as a matter of its supervisory authority over the courts of appeals.[93] Indeed, the *Olano* standard is itself such a rule. Of course, some kinds of errors can only be evaluated case by case—for example, rulings on evidence or jury instructions about witness credibility. But other kinds (such as harmful elemental errors) can be dealt with categorically.

Therefore, reversal is appropriate under the plain-error standard whenever a defendant shows that he was convicted without a jury finding on every element of the charge. At a minimum, there should be a presumption in favor of reversal. Such a presumption would recognize the inherently serious nature of elemental error, while leaving open the possibility that there might be some circumstances in which the *Olano* standard is not satisfied.

United States v. Perez, 67 F.3d 1371, 1386 (9th Cir. 1995), *reh'g en banc granted*, 77 F.3d 1210 (9th Cir. 1996); *Gaudin*, 28 F.3d at 952. The First and Second Circuits have reached the same conclusion regarding erroneous reasonable-doubt instructions, as has the Fourth Circuit with regard to constructive amendments of the indictment. *United States v. Colon-Pagan*, 1 F.3d 80 (1st Cir. 1993) (Breyer, C.J.); *United States v. Birbal*, 62 F.3d 456, 461 (2d Cir. 1995); *United States v. Floresca*, 38 F.3d 706, 713-14 (4th Cir. 1994).

[92]*Ortega-Rodriguez*, 113 S. Ct. at 1209 n.23. *See also* Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. at 771-73.

[93]*Cf. Thomas*, 474 U.S. at 146-48.

CONCLUSION

The right to trial by jury in criminal cases is not merely a procedural right. Its purpose is to "prevent oppression by the Government" by "interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen[.]"[94] The allocation of governmental power exclusively to a panel of jurors is therefore just as much an aspect of the separation of powers as is the division of authority among the legislature, the executive, and the judiciary. In this case, the Eleventh Circuit applied the purely procedural doctrines of harmless error and plain error in a way that erodes the profoundly substantive rights guaranteed by the Sixth Amendment.

The judgment below should therefore be reversed.

Respectfully submitted.

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[94] *Williams v. Florida*, 399 U.S. 78, 100 (1970).